

2005

A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments

Janet K. Levit

Follow this and additional works at: http://digitalcommons.law.utulsa.edu/fac_pub



Part of the [International Law Commons](#)

Recommended Citation

30 Yale J. Int'l L. 125 (Winter 2005).

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Articles, Chapters in Books and Other Contributions to Scholarly Works by an authorized administrator of TU Law Digital Commons. For more information, please contact daniel-bell@utulsa.edu.

A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments

Janet Koven Levit[†]

I.	INTRODUCTION	126
II.	BOTTOM-UP LAWMAKING IN INTERNATIONAL TRADE FINANCE	132
A.	<i>The UCP 500, the International Chamber of Commerce, and Letters of Credit</i>	133
1.	<i>The Financial Instrument</i>	133
2.	<i>The Lawmaking Group: The ICC Banking Commission</i>	134
3.	<i>Substantive Rules</i>	137
4.	<i>Procedural, Interpretive, and Remedial Rules</i>	138
5.	<i>Legal Status of the UCP</i>	140
B.	<i>The Berne Union and Export Credit Insurance</i>	144
1.	<i>The Financial Instrument</i>	144
2.	<i>The Lawmaking Group: The Berne Union</i>	146
3.	<i>Substantive Rules</i>	149
4.	<i>Procedural, Interpretive, and Remedial Rules</i>	153
5.	<i>Legal Status of Berne Union Rules</i>	156
C.	<i>ECAs and the Arrangement on Officially Supported Export Credits</i>	157
1.	<i>The Financial Instrument</i>	157
2.	<i>The Lawmaking Group: The Participants to the Arrangement</i>	158
3.	<i>Substantive Rules</i>	160
4.	<i>Procedural, Interpretive, and Remedial Rules</i>	162
5.	<i>Legal Status of the Arrangement</i>	163
D.	<i>The Anatomy of Bottom-Up International Lawmaking</i>	167
1.	<i>The Lawmakers</i>	167
2.	<i>Substantive Norms</i>	168
3.	<i>Institutionalization</i>	170
4.	<i>A Closed Legal System: Procedural, Interpretive, and Remedial Norms</i>	171
5.	<i>From Soft to Hard Law</i>	172
III.	BOTTOM-UP INTERNATIONAL LAWMAKING: CHALLENGES TO THE PREVAILING INTERNATIONAL LEGAL FRAMEWORKS	173
A.	<i>International Lawmaking Theory</i>	173
1.	<i>Beyond Customary International Law</i>	176

[†] Associate Professor of Law, University of Tulsa College of Law; Assistant General Counsel and Counsel, Office of General Counsel, Export-Import Bank of the United States (1998–2000); Associate General Counsel, TradeCard, Inc. (2000–2002); J.D., Yale University, 1994; M.A., Yale University, 1994; A.B., Princeton University, 1990. I thank the University of Tulsa College of Law, and particularly Dean Martin Belsky, for giving financial support to this project. I am particularly grateful to the many trade finance practitioners who shared their expertise, including: Ron Katz, Policy Manager, Commission on Banking Technique and Practice, International Chamber of Commerce; Jim Cruse, Vice President of Policy, Export-Import Bank of the United States; and Piper Starr, Vice President of Planning and International Relations, Export-Import Bank of the United States. I am indebted to Paul Schiff Berman, Russell Christopher, Lyn Entzeroth, Peter Evans, Edward Koven, Tamara Piety, and Melissa Tatum for invaluable insights and suggestions. This Article benefits from the ongoing mentorship and guidance of Owen Fiss, Harold Hongju Koh, and W. Michael Reisman. I thank Kristin Brown, Cara Collinson, and Kari Krince for their research assistance. As always, I am deeply appreciative of my husband, Kenneth Levit, for his insightful comments and sincere encouragement. I dedicate this Article to my daughter, Rebecca, who dreams of being a storyteller; and to my son, Nathan, who introduced bottom-up lawmaking in our household.

2.	<i>Transnational Legal Process</i>	180
3.	<i>Transgovernmental Networks</i>	182
4.	<i>Private Lawmaking</i>	183
5.	<i>International Lawmaking Theory: A Reprise</i>	188
B.	<i>Bottom-Up International Lawmaking and the International Legal Taxonomy</i>	189
1.	<i>Hard Law versus Soft Law, Binding Law versus Non-Binding Norms</i>	190
2.	<i>Public International Law versus Private International Law</i>	192
3.	<i>Comparative Law versus International Law</i>	192
4.	<i>The Lawmaking and Compliance Dichotomy</i>	193
5.	<i>Looking Forward</i>	194
IV.	THE LIMITS OF BOTTOM-UP LAWMAKING: TRANSPARENCY, ACCOUNTABILITY, AND THE DEMOCRATIC DEFICIT	194
A.	<i>International Lawmaking Through Private Clubs</i>	194
1.	<i>Exclusive Clubs</i>	195
2.	<i>Secretive Clubs</i>	197
B.	<i>Bottom-Up International Lawmaking and the Accountability Mismatch</i>	199
C.	<i>Solving the Accountability Mismatch?</i>	205
1.	<i>Accountability-Enhancing Mechanisms</i>	205
2.	<i>Input versus Output Legitimacy</i>	207
V.	CONCLUSION	209

I. INTRODUCTION

International law often makes storytellers of onlookers. The stories that gain scholarly and popular traction are of a common genre, focusing on international law from the top down. They typically center on a state's treaty-based commitments or on an intergovernmental institution born from a treaty.¹ They open with diplomats at majestic negotiating tables, secluded in remote yet pristine locations, wrangling politely over the text of a treaty. The climaxes are photo-opportunity events—a treaty-signing ceremony or the founding of a new institution. The denouement is the “trickle-down,” the inevitably imperfect business of translating international law into domestic or transnational practice. This traditional, top-down international lawmaking story tells of state actors making international law and imposing it on others who may have been quite removed, geographically and politically, from the entire lawmaking process.

Meanwhile, out of the limelight, alternative international lawmaking stories are unfolding. This Article introduces one such story, “bottom-up” international lawmaking. Bottom-up lawmaking tales do not feature state policymakers but rather the very practitioners—both public and private—who must roll up their sleeves and grapple with the day-to-day technicalities of their trade. On the basis of their experiences on the ground, these practitioners create, interpret, and enforce their rules. Over time, these initially informal rules blossom into law that is just as real and just as effective, if not more effective, as the treaties that initiate the top-down processes. To put it simply, in the traditional top-down approach, state elites enact rules (typically formal, treaty-based rules) that govern the practices and behavior of those who are

1. This Article employs the term “treaty” as defined in the Vienna Convention on the Law of Treaties, May 23, 1969, art. 2, 1155 U.N.T.S. 331, 333 (“‘Treaty’ means an international agreement concluded between States in written form and governed by international law.”).

subject to the rules. In contrast, in the bottom-up approach, the practices and behaviors of various actors inform and constitute the rules, which, in turn, govern the practices and behaviors of those very same actors. The drama in these bottom-up cases is how the informal, practice-based rules become law.

Because this Article offers bottom-up international lawmaking as an alternative route to law, it is important to clarify how it employs the terms “law” and “lawmaking.” On a domestic level, law includes constitutions, statutes, codes, regulations, and court decisions. International law includes those rules and norms that the international community deems technically binding or hard law, namely treaties or customary international law.² Other international rules and norms reside in the catch-all category of soft international law.³ The term “international lawmaking” describes broader, ongoing processes such as the bottom-up processes developed herein, which may or may not ultimately produce law. While this Article employs formalistic classifications of law, it does not advocate or endorse such classifications. In fact, as Part III will make clear, this Article’s lawmaking stories ultimately reveal formalistic classifications of law to be underinclusive because they exclude rules that function like law.

Part II of this Article offers an in-depth exploration of bottom-up lawmaking in the realm of international trade and finance. Most scholarship in this area centers on a group of high-profile, treaty-based institutions—the World Trade Organization (WTO), the International Monetary Fund (IMF), the World Bank, the North American Free Trade Agreement (NAFTA), and the European Union (EU). Yet the international trade and finance universe also includes informal rules and institutions, which do not adorn headlines or frequent scholarly presses but nonetheless effectively finance over a trillion dollars of international trade each year.⁴ Using a triad of little-known

2. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1986) [hereinafter RESTATEMENT (THIRD) OF FOREIGN RELATIONS] (discussing general principles of law); Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 33 U.N.T.S. 993 (same). Indeed, the aforementioned texts are the sources that almost all international law professors identify during the first week of class. See, e.g., BARRY E. CARTER ET AL., INTERNATIONAL LAW 1-7, 93-135 (4th ed. 2003); LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES & MATERIALS 56-133 (2001); MARK W. JANIS & JOHN E. NOYES, CASES AND COMMENTARY ON INTERNATIONAL LAW 20-132 (2d ed. 2001).

3. Soft law is not a precise legal term. It includes myriad international instruments or, more inclusively, communications ranging from informal understandings or conversations to more formalized memoranda of understanding, diplomatic letters, protocols, codes of conduct, or even informal gentlemen’s agreements, such as the Arrangement on Officially Supported Export Credits (the Arrangement) discussed *infra*, Part II.C. See Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 21, 25-31 (Dinah Shelton ed., 2000) (discussing different soft law forms—including memoranda of understanding, communiqués, minutes, “soft commitments” embedded in formal treaties, declarations, and agendas—and proposing a classification scheme for soft law instruments). See also Edith Brown Weiss, *Introduction*, in INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS (Edith Brown Weiss ed., 1997) (discussing non-binding norms); *A Hard Look at Soft Law*, 82 ASIL PROC. 371 (1988) (scholarly discussion of the nature of soft law); Joseph Gold, *Strengthening the Soft International Law of Exchange Agreements*, 77 AM. J. INT’L L. 443 (1983).

4. This \$1 trillion figure seems rather low when one aggregates the trade volumes supported by each of the trade finance instruments that this Article will discuss. Commercial letters of credit alone facilitated an estimated \$1 trillion in trade in 2002. Anand Pande, *The Future of Documentary Trade: Reducing Discrepancies in Letters of Credit*, in FINANCE ASIA, Apr. 2003, at 21; see also INTERNATIONAL UNION OF CREDIT AND INVESTMENT INSURERS, BERNE UNION YEARBOOK 203 (2004), available at <http://www.berneunion.org.uk/Berne%20Union%20Yearbook%202004.pdf> (reporting that

examples from the world of international trade finance, this Article argues that there are also compelling bottom-up international lawmaking stories to tell about this world. Part II recounts three such lawmaking tales.

First, the Uniform Customs and Practice for Documentary Credits (UCP) provides a set of transnational rules that commercial banks uniformly follow in their letter-of-credit practices. These rules are not the work of policymakers; they are the creation of private bankers who congregate under the auspices of the Commission on Banking Technique and Practice (Banking Commission) of the International Chamber of Commerce (ICC) to draft the rules and offer practice-based interpretations of their meaning. While the UCP is not technically law, courts in the United States and elsewhere frequently use it to decide letter-of-credit disputes.

Second, the International Union of Credit and Investment Insurers (Berne Union) is a nongovernmental institution, comprised of both private and public export credit insurers, that regulates the way its members conduct their business. On the basis of industry practice, the Berne Union has codified technical rules that circumscribe the nature and scope of members' export credit insurance policies. Over time, formal international lawmaking institutions have appropriated some of these rules, effectively transforming them into hard law. The discussion of the Berne Union rules herein is unique not only for offering a bottom-up lawmaking perspective, but also because the rules themselves have never been the subject of *any* scholarly publication. To date, the Berne Union rules have been inaccessible to researchers or, for that matter, anyone except Berne Union members.⁵

The third set of rules discussed in this Article, the Arrangement on Officially Supported Export Credits (the Arrangement), governs the financing of national exports by official export credit agencies (ECAs). The Arrangement is the handiwork of an ad hoc institution, the Participants Group, composed of government technocrats associated with their home ECA. The lawmakers, once again, are practitioners, and once again, the rules are anchored largely in their practical experiences. The Arrangement is not law—the text declares itself to be a “Gentlemen’s Agreement.”⁶ Over time, however, it has become law through incorporation not only into a WTO treaty but also into domestic legal systems, principally within the EU.

The core of the analysis presented below is the common pattern that each lawmaking process follows, which this Article labels “bottom-up

in 2002 Berne Union members issued export credit insurance to cover \$429 billion in short-term business and \$56 billion in medium- and long-term business); Keith A. Rowley, *Anticipatory Repudiation of Letters of Credit*, 56 SMU L. REV. 2235, 2236 n.7 (2003); Org. for Econ. Co-operation & Dev. (OECD), *Export Credit Activities in 2002*, tbl. 1, <http://www.oecd.org/dataoecd/13/44/7084900.pdf> (reporting that the Participants to the Arrangement supported approximately \$45 billion in medium- and long-term exports in 2002, equivalent to 35 billion Special Drawing Rights (SDRs)).

5. Facsimile from Kimberly Wiehl, Secretary-General, International Union of Credit and Investment Insurers (Berne Union), to Janet Koven Levit, Associate Professor of Law, University of Tulsa College of Law (Nov. 2, 2004) (on file with author) [hereinafter Facsimile from Secretary-General Wiehl].

6. See *infra* note 158 and accompanying text.

international lawmaking.”⁷ The process starts with a relatively small, homogeneous lawmaking group, reminiscent of a private club, that either establishes or appropriates an institutional home. The group creates substantive rules, which are essentially organic norms emanating from the practices of the respective practitioners. These rules, in turn, govern such practices. The lawmaking group also establishes procedural and remedial rules that simultaneously insulate the substantive rules and maintain their flexibility and proximity to actual group practice. The informal, practice-based rules ultimately embed themselves in a more formal legal system and become law. Fundamentally, bottom-up international lawmaking is a soft, non-choreographed process that produces hard legal results. In exposing these trade finance stories and offering them collectively in furtherance of a bottom-up approach to international lawmaking, this Article fills a gap in the scholarly appreciation of disparate international lawmaking processes.

It is not surprising that top-down international lawmaking dominates international legal scholarship. The legal realist attack on international law’s credentials as a legitimate, freestanding discipline triggered a counterattack by scholars showcasing those international lawmaking stories that looked and functioned most like “real” law.⁸ In response to this attack, formal international law, in particular the treaty (a consensual contractual relationship

7. Some have described bottom-up lawmaking as lawmaking by private parties, and top-down lawmaking as lawmaking by government actors. See Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 534 (2002) (noting that in cyberlaw, for example, “bottom-up norm creation” stands distinct from international law’s traditional “top-down” approach to norm creation, whereby norms are created by sovereign states). This Article deliberately steers clear of that usage, recognizing, as shown herein, that government actors can engage in bottom-up lawmaking, which is one of the important but unstated insights of transgovernmental network theories. See *infra* notes 224–231 and accompanying text. Others have alluded to the effect of bottom-up lawmaking by NGOs and other grass-roots movements on the shape and evolution of international law. See, e.g., BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE* (2003). Such scholars argue that NGOs and other grass-roots movements may significantly affect the texture of legal norms and in some cases generate pressure to change them. Yet these NGOs and grass-roots movements are generally not the source of the legal norms—in most relevant analyses the state remains the driver and architect of the law, and the pressure that NGOs exert is a direct function of the extent to which traditional state actors respond to such pressure. Instead, in this Article, bottom-up lawmaking refers to a process whereby discrete groups of transnational practitioners translate their practices and customs into code-like rules that ultimately harden into law.

8. The underlying realist contention says that in an anarchical world of nation-states, countries pursue their self-interest limited only by their own power. International law, therefore, is not law at all but a shrewd and ephemeral reflection of state power, interests, and preferences. The realists leave little room for legal institutions and fundamentally challenge the relevance of international law. See Francis A. Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics*, 10 CAL. W. INT’L L.J. 193, 198 (1980) (“[i]nternational law is devoid of any intrinsic significance within the calculus of international political decision-making”); Stanley Hoffmann, *The Role of International Organizations: Limits and Possibilities*, 10 INT’L ORG. 357, 364 (1956) (arguing that power politics, particularly Cold War politics, limit and paralyze international institutions). For a further sampling of the realist critique, see HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (5th ed. 1978); FRANCIS ANTHONY BOYLE, *WORLD POLITICS AND INTERNATIONAL LAW* (1985).

In more refined versions of the realist critique, state interests are partially derivative of the structure of the international system. See generally KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979). See also Jonathan D. Greenberg, *Does Power Trump Law?*, 55 STAN. L. REV. 1789 (2003) (a modern review of the realist critique, arguing that it remains a potent force in international law and international relations and exhorting international legal scholars to take the realist critique seriously).

among states) and institutions born from treaties (international courts and international legislative bodies) received the disproportionate attention of international lawyers and legal scholars.⁹ Because bottom-up international lawmaking is rooted in the informal—in spontaneous, unchoreographed processes and soft, practice-based rules—it is unattractive fodder to those fending off the legal realists. Consequently, bottom-up international lawmaking remains largely undiscovered as an alternative path to law.

Yet these bottom-up examples are critically important to international legal scholarship because they challenge prevailing international lawmaking theory and paradigms. Part III.A of this Article discusses the difficulties that bottom-up lawmaking poses to extant schools of thought on international lawmaking by examining four prominent theories: first, customary international lawmaking; second, transnational legal process; third, transgovernmental network theory; and fourth, private lawmaking. Each theory significantly transcends traditional top-down approaches. Furthermore, each theory has already touched upon important pieces of the bottom-up international lawmaking process. But no single theory explains the collective bottom-up lawmaking phenomenon described in this Article.

Admittedly, customary international law, like bottom-up international lawmaking, roots law in practice. Yet current customary international law scholarship does not capture the dynamic of bottom-up lawmaking that this Article depicts. While customary international law derives from the official acts and pronouncements of traditional *state* actors, this Article roots law in the daily practices of export finance *practitioners*, some of whom are private actors and others government technocrats. While customary international law offers general legal rules, bottom-up lawmaking generates a specific, technical regulatory system.

Nor do the other prevailing theories of international lawmaking capture all that is happening in bottom-up international lawmaking. The transnational legal process school recognizes that the state no longer owns international lawmaking, which is rather an ongoing process engaging a number of transnational actors. Yet transnational legal process stories typically begin with a treaty or some other legal instrument that triggers a trickle-down process whereby domestic legal systems absorb international law. In contrast, bottom-up lawmaking features soft rules ascending to legal status. Moreover, the transgovernmental network scholars locate international lawmaking in transnational networks of lower-level government technocrats, who translate technical expertise into informal norms and, sometimes, formal law. While transgovernmental network theory, like bottom-up lawmaking, links rules to

9. A perusal of the tables of contents from the last decade of the *American Journal of International Law*, the *Yale Journal of International Law*, the *Virginia Journal of International Law*, and the *Harvard International Law Journal* reveals that articles on formal treaties, the intergovernmental institutions that treaties constitute, and the incorporation of treaties into U.S. law dominate scholarly discourse. This trend was confirmed at the 2004 Annual Meeting of the American Society of International Law: of twenty-nine panels, eighteen focused on some international treaty regime, including the institutions to which the treaty gave birth; three focused on the incorporation of treaties and other international agreements into U.S. domestic law; and three focused on quintessentially comparative topics. The American Society of International Law, *Mapping New Boundaries: Shifting Norms in International Law*, 98th Annual Meeting Program (Mar. 31-Apr. 3, 2004), Washington, D.C.

practices in the trenches, it ignores private practitioners as a source of substantive norms. The burgeoning group of “social norm” or “private lawmaking” scholars likewise appreciates that on-the-ground practices of homogeneous, closely knit groups may constitute potent norms. Yet in their wariness of the state, these scholars neglect government technocrats as a source of transnational social norms and likewise fail to explore the relationship between informal norms and formal law. Because this Article’s bottom-up lawmaking examples expose even these newer international lawmaking theories as somewhat atomistic and disjointed, the examples presented herein invite further scholarly discourse on the existing gaps in international lawmaking theory.

Part III.B turns from international legal theory to an exploration of how bottom-up lawmaking bears on the international law taxonomy. Over the last several decades, international legal scholars painstakingly developed a rigid classification scheme, organizing international law around a series of bright-line dichotomies: hard (binding) international law versus soft (non-binding) international law; public international law versus private international law; international law versus comparative law. This taxonomy critically organized international law as a coherent, focused discipline, making it more scientific and methodical at a moment when the legal realists were challenging its legitimacy. But bottom-up international lawmaking stories resist easy classification. Part III.B casts doubt on whether the traditional either/or classification scheme meaningfully accommodates contemporary bottom-up international lawmaking.

Yet as an alternative route to law, bottom-up international lawmaking itself poses an existential problem. Are bottom-up lawmaking processes legitimate routes to law? Part IV explores this question. The homogeneous, club-like groups that drive these processes are exclusive and operate in secret. The substantive rules that they develop are not rooted in the contractual consent of politicians but rather in the unstated, or understated, commonalities of on-the-ground practice. These rules nonetheless evolve into law with an impact that reaches well beyond the original lawmaking group. Thus, bottom-up international lawmaking proceeds without the accountability normally demanded of democratic lawmaking. Does this democratic deficit delegitimize the law so produced? Some scholars answer this question affirmatively and focus on *remedying* the democratic deficit through the introduction of accountability-enhancing mechanisms. Yet injecting accountability—through transparency and consultations with stakeholders—necessarily destroys the close-knit homogeneity of the lawmaking club that is the powerful engine of bottom-up lawmaking. These clubs have proven to be quite effective regulators, financing over a trillion dollars in trade each year. Thus, some scholars focus instead on *overshadowing* any democratic deficit through showcasing the efficacy and strength of the ensuing law. This latter path may prove particularly useful in legitimating bottom-up lawmaking—as long as the lawmakers lift the veil of secrecy high enough that outsiders may actually observe legal outputs prior to making efficacy judgments.

Bottom-up lawmaking undoubtedly bears on how scholars conceive of international law and lawmaking, but it also raises issues of interest to legal scholars outside of international law. Bottom-up international lawmaking is fundamentally a story of practitioners efficiently and effectively managing their trade through the creation and enforcement of their own norms. Thus, it offers law and economics scholars a contemporary window into the evolution of private or social norms on a transnational plane, far from the micro-societies these scholars typically analyze. Additionally, the bottom-up lawmaking progression—from informal norms to formal law—generates pressure for increased transparency, accountability, and democratization in the lawmaking process. However, relieving such pressure with accountability-enhancing measures may crack the integrity of the lawmaking group and undermine an otherwise effective lawmaking process. Here lies the seemingly insoluble dilemma of choosing between democratic lawmaking and effective legal outcomes. This dilemma, pitting input legitimacy against output legitimacy, transcends international law and haunts numerous legal disciplines, from administrative law to criminal procedure. As bottom-up international lawmaking illuminates this dilemma on a transnational scale, it opens fresh opportunities for interdisciplinary discourse.

II. BOTTOM-UP LAWMAKING IN INTERNATIONAL TRADE FINANCE

The international rules that this Article examines address a fundamental conundrum in cross-border trade—how to extend credit effectively and efficiently within the international trading system. More precisely, if growth in international trade depends on buyers' maintaining enough liquidity to continue buying and sellers' maintaining enough liquidity to continue producing, what types of financial instruments will satisfy these ostensibly competing demands? One answer is export credit instruments. This Article explores three such instruments—the letter of credit, export credit insurance, and the official export credit guarantee.

Just as the extension of credit has been fundamental to the growth of the domestic economy, the extension of trade credit has been crucial to the growth of the international trading system.¹⁰ Credit mechanisms allow buyers to defer payment (thereby maintaining liquidity) and shift the risk of non-payment during the credit period to other parties. An "open account" trade transaction is one in which an exporter (seller) offers the importer (buyer) credit financing from its own balance sheet; the exporter thus bears the risk of non-payment. Often, the exporter alone will not have the liquidity or the appetite to bear this risk. But herein lies the problem. In an ultra-competitive, quickly globalizing economy where importers can almost always find a competitive supplier, frequently from another country, that is willing to extend credit, an exporter's decision not to extend credit will kill the underlying transaction. An export credit instrument solves this problem for the exporter by passing the risk of importer non-payment to a third party—such as a bank (letters of credit); an

10. Raymond Fisman & Inessa Love, *Trade Credit, Financial Intermediary Development, and Industry Growth*, 58 J. FIN. 373 (2003); Alan G. Jamieson, *Credit Insurance and Trade Expansion in Britain, 1820-1980*, 1 ACCT., BUS. & FIN. HIST. 163 (1991).

insurance provider (export credit insurance); or an official ECA (official export credit guarantees). Through this type of risk-passing or financial intermediation, exporters may offer competitive credit options while maintaining a viable risk portfolio and sufficient liquidity to increase business and the overall volume of trade.

If these export credit instruments are to perform their job of lubricating international trade, all parties to the trade transaction must have confidence in their integrity and viability. These instruments inevitably cover exporters from one country, importers from another, and a financial intermediary possibly from a third country. A single domestic legal system cannot regulate them. Accordingly, international rules have surfaced for each instrument, not only boosting user confidence but also rationalizing performance expectations. What is particularly interesting, and what this Article will explore, is how these international rules emerged, especially because their lawmaking paths stand distinct from more conventional lawmaking stories.

A. *The UCP 500, the International Chamber of Commerce, and Letters of Credit*

1. *The Financial Instrument*

A commercial letter of credit,¹¹ in its most basic form, is a contract—literally a letter—between banks on behalf of an exporter (beneficiary). The importer (applicant) contracts with one bank (issuing bank), with which the applicant usually has some relationship. The issuing bank promises to pay for the goods, i.e., release funds to the beneficiary's bank (advising or confirming bank),¹² once it receives documentary evidence that the underlying sales transaction has proceeded as the exporter and importer had planned and as described with specificity in the letter.¹³ If the documents, not the underlying transaction itself, satisfy all the conditions in the letter of credit, then the issuing bank will pay the advising or confirming bank, either on sight

11. For an accessible description of the intricacies of letters of credit, see CHARLES DEL BUSTO, ICC GUIDE TO DOCUMENTARY CREDIT OPERATIONS FOR THE UCP 500 (1994). The commercial letter of credit stands distinct from the standby letter of credit, which is effectively a performance guarantee. See INT'L CHAMBER OF COMMERCE, PUB. NO. 590, INTERNATIONAL STANDBY PRACTICES ISP98 (1998). For a description of standby letters of credit, see Rowley, *supra* note 4, at 2244-45.

12. An advising bank, on behalf of the beneficiary, acts as an intermediary between the issuing bank and the beneficiary. See DEL BUSTO, *supra* note 11, at 24. A confirming bank acts on behalf of the beneficiary as an intermediary between the issuing bank and the advising bank, but it also offers an independent promise to pay the beneficiary upon presentation of documents that comply with the letter of credit regardless of whether the issuing bank pays—a significantly more costly transaction. See *id.* at 44 ("An irrevocable Confirmed Documentary Credit gives the Beneficiary a double assurance of payment, since it represents both the undertaking of the Issuing Bank and the undertaking of the Confirming Bank.").

13. The letter typically requires the seller to deliver goods (possibly with specified quality assurances) to a shipping company at a certain port by a certain date, at which point the goods are loaded on a ship or other mode of transportation and the classic international trade documents—bill of lading, purchase order, packing list, commercial invoice, insurance certificate, customs documents—are sent (usually via regular or express mail but rarely electronically) to the issuing bank. See *id.* at 47 (example of an irrevocable, confirmed documentary credit).

(immediately) or at some later time, as stipulated in the letter of credit.¹⁴ The most fundamental legal principle in this documentary transaction is the independence of the letter of credit; the contract between the issuing bank and the advising or confirming bank stands distinct from the underlying sales transaction, which is governed by the contract between buyer and seller.¹⁵

Letters of credit are essentially conditional promises to pay for goods or services made by one bank to another, substituting the credibility of the bank's promise for the buyer's promise to pay. From both buyer's and seller's vantage point, the letter of credit is a risk-mitigation tool.¹⁶ The seller's risk is no longer that of buyer default (a clear risk if the seller ships goods on open account) but rather bank fraud or default.¹⁷ As long as the buyer carefully stipulates the conditions of payment in the letter of credit, the buyer's risk that the seller will not perform is less than if it had sent cash in advance.¹⁸ A letter of credit is also a financing tool. A letter of credit may involve deferred payment, usually not more than 180 days, thereby replicating the deferred payment advantages of an open account transaction.¹⁹ A letter of credit backing a trade receivable (an importer's promise to pay for goods at some later date) strengthens the exporter's ability to sell the receivable or borrow against it for immediate working capital or general liquidity.

2. *The Lawmaking Group: The ICC Banking Commission*

Letters of credit are governed in large part by an arcane set of rules known primarily as the UCP. Following World War I, as the demographics of international trade began to change, strangers—or at least those who had not enjoyed a long-standing trading relationship—increasingly engaged in

14. While the issuing bank must decide whether these conditions have been met prior to releasing funds, the bank's scope of review is limited to the documents. In this sense, the letter of credit is called a documentary credit, with the bank's compliance decisions linked not to the underlying transaction (or the exporter's actual performance) but rather to the documents that accompany the transaction. For an excellent description of how letters of credit work, see David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 390-91 (2003); see also DEL BUSTO, *supra* note 11. For a discussion of time drafts (i.e., payment not upon presentment of the documents but rather at some later, agreed-upon date), see F. P. DE ROOY, *DOCUMENTARY CREDITS* 19 (1984).

15. See, e.g., Roy Goode, *Abstract Payment Undertakings and the Rules of the International Chamber of Commerce*, 39 ST. LOUIS U. L.J. 725, 731-35 (1995); see also INT'L CHAMBER OF COMMERCE, PUB. NO. 500, *ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS* art. 3 (1993) [hereinafter UCP 500] ("Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the Credit.").

16. But see Ronald Mann, *The Role of Letters of Credit in Payment Transactions*, 98 MICH. L. REV. 2494 (2000) (arguing that, given the number of discrepancies, letters of credit should not be viewed in terms of a payment guarantee but rather as an outsourcing of transaction verification).

17. An open account transaction is "[a]n arrangement between the buyer and seller whereby the goods are manufactured and delivered before payment is required." DEL BUSTO, *supra* note 11, at 19. The seller's risk is one of bank insolvency and/or dishonesty, a risk that the seller can mitigate by requiring that the issuing bank be a large, reputable, money-center bank, or by asking a local bank to serve as a confirming bank. *Id.*

18. The buyer's risk also includes the possibility that the documents do not accurately reflect the underlying transaction, due to either fraud or mistakes. Although the UCP 500 does not currently consider this risk with clarity, it nonetheless poses an important problem. See DETLEV F. VAGTS ET AL., *TRANSNATIONAL BUSINESS PROBLEMS* 307-10 (3d ed. 2003).

19. See DEL BUSTO, *supra* note 11, at 92 (explaining settlement by acceptance using a time draft).

interstate commerce.²⁰ In this environment, exporters pressed for a financial instrument that could mitigate the risks of doing long-distance business with unknown partners. The letter of credit ascended to prominence in the United States, which was capturing an increasingly large share of the export market vis-à-vis Europe, in particular the United Kingdom. Recognizing the utility of standard international banking practices and rules, and anxious to assure international acceptance of their own letters of credit,²¹ U.S. money-center banks lobbied the ICC in the mid-1920s to codify rules that would reflect such standard practices.²² In 1933, the ICC approved and published the first set of rules, which did not gain widespread acceptance until, in 1951, the ICC “brought the rules into line with the developments which had taken place in trade.”²³ Approximately every decade thereafter, the ICC has revised the UCP to maintain its consonance with banking practice.²⁴ The ICC published the UCP 500, the sixth UCP incarnation,²⁵ in 1993 and is currently working on a new version.²⁶

The ICC is neither a governmental organization nor an intergovernmental or international organization. It is a private business organization, a type of mega-trade association that champions the “global

20. DE ROOY, *supra* note 14, at 9.

21. ROLF A. SCHUTZE & GABRIELE FONTANE, DOCUMENTARY CREDIT LAW THROUGHOUT THE WORLD 11 (2001) (noting that the original ICC codification efforts were able “to establish harmonized rules for documentary credit transactions and to override diversions in those rules previously set up by national banking associations”).

22. DE ROOY, *supra* note 14, at 10. Several prominent law review articles seem to have played a role in this effort. See e.g., Philip W. Thayer, *Irrevocable Credits in International Commerce: Their Legal Nature*, 36 COLUM. L. REV. 1031 (1936) (tracing the historical treatment of banker acceptances and buyers’ letters of credit, and calling for a unified, transnational legal approach).

23. DE ROOY, *supra* note 14, at 10.

24. According to the ICC:

[T]he drafters of UCP have always embraced emerging developments in trade: the 1974 revision was drafted in part because of changes in container combined transport; the 1983 revision responded to new technical standards in transport and telecommunications; and in 1993 UCP 500 took account of ‘documents produced or appearing to be produced by reprographic, automated or computerized systems,’ ‘facsimile signatures’ and ‘electronic methods of communication.’

INT’L CHAMBER OF COMMERCE, PUB. NO. 500/2, UCP 500 + EUCP 3 (2002) [hereinafter UCP 500 + EUCP].

The 1974 revision accommodated the move from traditional FOB (Free on Board) and CIF (Cost, Insurance, and Freight) terms to those terms associated with container transport. See INT’L CHAMBER OF COMMERCE, PUB. NO. 560, INCOTERMS 2000: ICC OFFICIAL RULES FOR THE INTERPRETATION OF TRADE TERMS (2000) [hereinafter INCOTERMS 2000]; DE ROOY, *supra* note 14, at 11. The last revision, in 1993, was motivated in great part by changes in shipping and transport documents. SCHUTZE & FONTANE, *supra* note 21, at 11; INT’L CHAMBER OF COMMERCE, PUB. NO. 511, DOCUMENTARY CREDITS: UCP 400 & 500 COMPARED (Charles del Busto ed., 1993) (describing, article by article, the changes in letter of credit banking practice that led to demands for the revision of the UCP 400 and the promulgation of the UCP 500).

25. The predecessors to the UCP 500, *supra* note 15, are: INT’L CHAMBER OF COMMERCE, PUB. NO. 69, ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1933); INT’L CHAMBER OF COMMERCE, PUB. NO. 151, ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1951); INT’L CHAMBER OF COMMERCE, PUB. NO. 222, ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1962); INT’L CHAMBER OF COMMERCE, PUB. NO. 290, ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1974); INT’L CHAMBER OF COMMERCE, PUB. NO. 400, ICC UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1983).

26. Telephone Interview with Ron Katz, Policy Manager, Commission on Banking Technique and Practice, International Chamber of Commerce (June 24, 2004) [hereinafter Ron Katz Interview] (noting that the new revision of the UCP 500 is under way).

economy as a force for economic growth, job creation and prosperity.”²⁷ The ICC’s home is Paris yet its tentacles reach into most countries through national committees, such as the U.S. Council for International Business (the U.S. national committee).²⁸ The ICC’s membership includes some of the largest companies, banks, and service providers in the world.²⁹

Within the ICC, the Banking Commission drafts, disseminates, and revises the UCP. The national committees appoint Banking Commission members on the basis of interest and expertise, resulting in a Commission dominated by bankers but also including lawyers, consultants, and transport specialists.³⁰ The Banking Commission appoints a working group (or task force) from its membership to draft (or redraft) the UCP; the working group may also include some law professors.³¹ Once the working group settles on a text, the Banking Commission must then approve it.³² The Banking Commission makes decisions by weighted block voting on a country-by-

27. Int’l Chamber of Commerce, What Is ICC?, at http://www.iccwbo.org/home/menu_what_is_icc.asp.

28. National committees are organizations that are affiliated with the ICC, serving as quasi branch offices. A company can become a member of the ICC via affiliation with a national committee. The U.S. Council for International Business serves as the U.S. national committee, for example. For a list of national committees, see http://www.iccwbo.org/home/menu_national_committees.asp. As is evident from this list, most industrialized countries have national committees. Alternatively, a company can become a direct member by paying a hefty fee (between €1500 and €3000, depending on the size and scope of the company’s business). While members principally include companies, membership is open to professional associations, “business and employers federations,” law firms, consultants, chambers of commerce, and other “[i]ndividuals involved in international business.” Int’l Chamber of Commerce, ICC Membership, at http://www.iccwbo.org/home/intro_icc/membership.asp.

29. The ICC website shows a demonstrative list of member companies, including AT&T, British Telecom, Chevron, Cementos Mexicanos (Cemex), Corning, Dow Chemical, Exxon, Ford, General Electric, General Motors, Hewlett Packard, Hitachi, IBM, Johnson & Johnson, Microsoft, Merck, Nokia, Samsung, Texas Instruments, 3M, Toshiba, Volvo, and Westinghouse. Member banks include BankBoston N.A., Barclays Bank, Chase Bank, Citicorp, Credit Suisse, HSBC, ING, Industrial Bank of Japan, National Westminster Bank, Standard Chartered Bank, and Tokyo-Mitsubishi Bank. Member service providers include Baker & McKenzie (attorneys), Clifford Chance (attorneys), Chubb Group (insurance), Deloitte & Touche (accountants, auditors, and consultants), Ernst & Young (accountants, auditors, and consultants), Federal Express (logistics), KPMG Peat Marwick (accountants, auditors, and consultants), Mastercard (payment, financial supply chain), and Transsystem International Freight Forwarding Company (logistics). See Int’l Chamber of Commerce, ICC Membership, *supra* note 28.

30. E-mail correspondence from Ron Katz, Policy Manager, Commission on Banking Technique and Practice, International Chamber of Commerce (Apr. 20, 2004, 04:39) [hereinafter E-mail from Ron Katz]. A member of the Commission on Banking Technique and Practice (Banking Commission) may be appointed through ICC national committee membership or through direct membership. See Ron Katz Interview, *supra* note 26.

31. The task force that drafted the UCP 500 included bankers from large, money-center banks and professors. See UCP 500, *supra* note 15, at 6-7 (listing members of the working group). When drafting a document such as the UCP, the working group may also consult with the ICC’s Transport Commission and Insurance Commission, E-mail from Ron Katz, *supra* note 30, although the working group that drafted the UCP 500 apparently did not do so. See Ross P. Buckley, *The 1993 Revision of the Uniform Customs and Practice for Documentary Credits*, 28 GEO. WASH. J. INT’L L. & ECON. 265, 267 (1995) (the 1993 UCP 500 revision was drafted by “bankers, bank lawyers, and law professors” specializing in banking law, without any representation from transport, insurance, or exporters and importers); see also Int’l Chamber of Commerce, How ICC Works, at http://www.iccwbo.org/home/intro_icc/how_works.asp (describing work of commissions, including elaboration of rules).

32. Before the Banking Commission votes on a text, it circulates the text to national committees and Banking Commission members for comment and revises the text at its discretion on the basis of these comments. See E-mail from Ron Katz, *supra* note 30.

country basis.³³ The ICC Executive Board must then adopt the text, with the ICC World Council effectively rubberstamping the Executive Board's approval.³⁴

3. *Substantive Rules*

The title of the Banking Commission's core document—Uniform Customs and Practice—captures the essence and purpose of the Commission's substantive rules. The UCP strives to codify “international banking practices, as well as to facilitate and standardize developing practices” among the not-so-glitzy trade finance shops, usually hidden in the dungeons of large, money-center banks.³⁵ The current version of the UCP, the UCP 500, is a technical document with forty-nine articles covering a myriad of issues, from the standard of care that banks must exercise in examining documents,³⁶ to standard practices for banks' examination of international trade documents,³⁷ to the allocation of “liability or responsibility” for either payment or non-payment.³⁸ In April 2002, the Banking Commission supplemented the UCP 500 with a UCP 500 for electronic presentation (the eUCP), designed to answer legal questions arising from the electronic transmission of documents in a letter of credit transaction. The eUCP includes twelve articles that, when

33. Delegations have one, two, or three votes, depending on the dues that the respective countries pay to the ICC. The delegations with three votes are France, Germany, the United States, and the United Kingdom. No matter how many representatives a national committee sends to the ICC meetings, and no matter how many direct members come from countries that do not have national committees, all members from the same country must vote the same way. See Ron Katz Interview, *supra* note 26.

34. Int'l Chamber of Commerce, How ICC Works, *supra* note 31; see also E-mail from Ron Katz, *supra* note 30. Note that this process mimics a private legislative process that has been described in relation to the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 607-08 (1995) (describing the process of private legislating as (1) request for new law; (2) technical study and drafting group; (3) creating law and reporting it for approval by broader committee; and (4) formal passage by group as whole). Professor Paul Stephan has also commented upon the similarities between the ICC and these domestic private legislatures. See Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681, 713-15 (1996).

35. See UCP 500, *supra* note 15, at 4.

36. *Id.* art. 13, at 19.

37. For standards regarding transport documents, see UCP 500, *supra* note 15, art. 23, at 26 (Marine/Ocean Bill of Lading); *id.* art. 24, at 29 (Non-Negotiable Sea Waybill); *id.* art. 25, at 32 (Charter Party Bill of Lading); *id.* art. 26, at 33 (Multimodal Transport Document); *id.* art. 27, at 35 (Air Transport Document); *id.* art. 28, at 37 (Road, Rail, or Inland Waterway Transport Documents); *id.* art. 29, at 38 (Courier and Post Receipts); *id.* art. 30, at 39 (Transport Documents issued by Freight Forwarders); *id.* art. 31, at 40 (“On Deck,” “Shipper's Load and Count,” Name of Consignor); *id.* art. 32, at 40 (Clean Transport Documents); *id.* art. 33, at 41 (Freight Payable/Prepaid Transport Documents). For standard practice regarding insurance documents, see *id.* arts. 34-36, at 42-43. For standard practice regarding issuing banks' treatment of commercial invoices, see *id.* art. 37, at 44.

38. *Id.* art. 15, at 21 (stating that banks “assume no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document(s)”). In other words, a bank that pays a credit in reliance on a falsified document, such as a falsified invoice or bill of lading, which nonetheless appears legitimate on its face, is not liable to the buyer or the issuing bank for such payment.

included in a letter of credit, will govern electronic presentations of documents.³⁹

4. *Procedural, Interpretive, and Remedial Rules*

While one of the Banking Commission's responsibilities is drafting the UCP, another is clarifying interpretive ambiguities in the document.⁴⁰ Notably, the Banking Commission issues advisory opinions in response to on-the-ground, UCP-related questions from bankers, freight forwarders, exporters, and importers.⁴¹ Although Banking Commission opinions are rather

39. INT'L CHAMBER OF COMMERCE, PUB. NO. 500/3, UCP SUPPLEMENT FOR ELECTRONIC PRESENTATION (EUCP) (2002) [hereinafter eUCP]; see also Neil Chantry, *The Future of the eUCP*, DC INSIGHT, Apr./June 2002, <http://www.iccbooksusa.com/index.cfm?fid=149>. The eUCP is an electronic counterpart to the more familiar UCP 500, born from the growing use of electronic media to transfer information in international trade and banking. *Id.* The eUCP operates as a supplement to the UCP 500 and does not revise existing UCP 500 guidelines. INT'L CHAMBER OF COMMERCE, UCP 500 + eUCP, *supra* note 24, at 3. The eUCP has been tailored specifically for electronic presentations. Obviously, the procedure for the presentation of tangible documents will diverge significantly from the analogous but intangible electronic presentation of the same type of information. The eUCP outlines a format in which electronic records should be presented; elucidates the consequences of a bank's inability to receive an electronic record even though it is open; provides for the handling of electronic refusal of a record; defines an electronic original; and describes the implications of data corruption of a record due to a defect or a virus. *Id.* at 50.

40. The Banking Commission issues a hierarchy of interpretive material. On top are Commission-approved documents, which are usually drafted by a working group before Commission-wide ratification. The Banking Commission also issues recommendations, which are practical, educational guides for document checkers and others whose core business is UCP compliance; recommendations are not ratified by the Commission as a whole. See, e.g., ICC Comm'n on Banking Technique and Practice, *Discrepant Documents, Waiver and Notice: An ICC Banking Commission Recommendation* (2002), available at <http://www.iccwbo.org/home/banking/952rev2%20Intranet-Internet%20version%20of%20Examination%20and%20Waiver.pdf> (creating a step-by-step flow chart for document checkers at issuing banks concerning the application of UCP Article 13 (Standard for Examination of Documents) and Article 14 (Discrepant Documents and Notice)). ICC banking documents and publications that have not been approved by the Banking Commission have a status distinct from, and presumably lower than, those documents that the entire Banking Commission has approved. The Banking Commission is also a prolific publisher of guides, studies, and handbooks that do not bear any official Banking Commission approval (other than publication under its auspices) but nonetheless are instructive. See, e.g., DEL BUSTO, *supra* note 11; JAMES BYRNE & CHRISTOPHER BRYNES, 2004 ANNUAL SURVEY OF LETTER OF CREDIT LAW & PRACTICE (2004); JAMES BYRNE & DAN TAYLOR, PUB. NO. 639, ICC GUIDE TO THE EUCP (2002); CHARLES DEL BUSTO, CASE STUDIES ON DOCUMENTARY CREDITS UNDER UCP 500 (1995) [hereinafter DEL BUSTO, CASE STUDIES ON DOCUMENTARY CREDITS].

41. See INT'L CHAMBER OF COMMERCE, PUB. NO. 371, DECISIONS (1975-1979) OF THE ICC BANKING COMMISSION ON QUERIES RELATING TO UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (UCP) (1980) [hereinafter DECISIONS (1975-1979)]; INT'L CHAMBER OF COMMERCE, PUB. NO. 434, OPINIONS OF THE ICC BANKING COMMISSION ON QUERIES RELATING TO UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (UCP) 1984-1986 (1987); INT'L CHAMBER OF COMMERCE, PUB. NO. 469, OPINIONS OF THE ICC BANKING COMMISSION ON QUERIES RELATING TO UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (UCP) 1987-1988 (1989); INT'L CHAMBER OF COMMERCE, PUB. NO. 494, OPINIONS OF THE ICC BANKING COMMISSION ON QUERIES RELATING TO UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (UCP) 1989-1991 (1992); INT'L CHAMBER OF COMMERCE, PUB. NO. 565, OPINIONS OF THE ICC BANKING COMMISSION (1995-1996) (Gary Collyer, ed. 1997) [hereinafter OPINIONS (1995-1996)]; INT'L CHAMBER OF COMMERCE, PUB. NO. 596, OPINIONS OF THE ICC BANKING COMMISSION 1997: MORE QUERIES AND RESPONSES ON DOCUMENTARY CREDITS (Gary Collyer, ed. 1998) [hereinafter OPINIONS (1997)]; INT'L CHAMBER OF COMMERCE, PUB. NO. 613, OPINIONS OF THE ICC BANKING COMMISSION 1998-1999: QUERIES AND RESPONSES ON UCP 500, 400, 522 (Gary Collyer, ed. 2000) [hereinafter OPINIONS (1998-1999)]; INT'L CHAMBER OF COMMERCE, PUB. NO. 632, ICC BANKING COMMISSION COLLECTED OPINIONS 1995-2001 ON UCP 400, UCP 500, URC 522 & URDG 458 (Gary Collyer, ed. 2002) [hereinafter OPINIONS 1995-2001].

brief, and the analysis is often opaque, they are reminiscent of judicial opinions, weaving facts, the relevant UCP rules, and previous Banking Commission opinions to reach rational answers to practitioner questions.⁴² In addition to query-specific opinions, the Banking Commission issues official policy statements to address recurring themes and problems that surface during the opinion-writing process.⁴³ Procedurally, Banking Commission members must ratify an opinion or a policy statement prior to its becoming an official Banking Commission document.

While the Banking Commission issues its opinions in an advisory mode, the Documentary Instruments Dispute Resolution Expertise (DOCDEX) thrusts the Banking Commission into live disputes.⁴⁴ DOCDEX is a relatively new Banking Commission venture,⁴⁵ allegedly born from bankers' complaints

42. See, e.g., the following opinions collected in *OPINIONS* (1998-1999), *supra* note 41: R.305, R.313 (citing *Position Paper No. 2*, *infra* note 43); R.315 (citing *Position Paper No. 1*, *infra* note 43); R.433 (citing Comm'n on Banking Technique and Practice, *Policy Statement: The determination of an 'Original' document in the context of UCP 500 sub-Article 20(b)* (July 12, 1999), http://www.iccwbo.org/home/statements_rules/statements/1999/the_determination_of_an_original_document.asp [hereinafter ICC Banking Comm'n, *Policy Statement: The determination of an 'Original' document*]).

As in judicial opinions, there seems to be a "last in time" rule in operation, meaning that a subsequent opinion can and does supersede a previous one. See Comm'n on Banking Technique and Practice, ICC Banking Commission approved documents/publications (July 8, 2003), http://www.iccwbo.org/home/statements_rules/statements/2003/banking_documents.asp (noting that some policy statements may be superseded by subsequent Banking Commission Opinions); see also R.313 (superseding a previous decision in R.246), R.349 (reversing R.283), R.458 (overriding R.195), in *OPINIONS* 1995-2001, *supra* note 41.

The Banking Commission also seems to follow some jurisdictional rules in deciding the types of queries that warrant its issuing an opinion. A query to the Banking Commission has the potential of spurring a published opinion when: (1) the query raises an issue of first impression; (2) the query is rooted in practice and experience, and is not purely educational or hypothetical; and (3) the Banking Commission officers believe the query warrants publication as an opinion. *OPINIONS* (1998-1999), *supra* note 41, at 3. The first jurisdictional threshold is particularly interesting because it implies that second impression questions are somewhat redundant; this position implicitly lends precedential weight to Banking Commission opinions and, presumably, policy statements.

43. The Banking Commission drafts policy statements following an onslaught of queries on a particular topic or to preempt an emerging practice that is inconsistent with the intent of the Banking Commission when it drafted the UCP. For example, following the UCP 500's debut, the Banking Commission also issued position papers which, like policy statements, give a type of advisory opinion independent of any specific query, but are pointed at banks for incorrectly appropriating and applying the UCP 500. See Comm'n on Banking Technique and Practice, *Policy Statement: Position Papers No. 1, 2, 3, 4 on UCP 500* (Sept. 1, 1994), available at http://www.iccwbo.org/home/statements_rules/statements/1994/credoc_1-2-3-4.asp. Each position paper addresses a discrete portion of the UCP 500: sub-Article 9(d)(iii) (*Position Paper No. 1*); sub-Article 10(b)(ii) (*Position Paper No. 2*); sub-Article 13(c) (*Position Paper No. 3*); and the transport documents articles (*Position Paper No. 4*). See also INT'L CHAMBER OF COMMERCE, PUB. NO. 645, INTERNATIONAL STANDARD BANKING PRACTICE FOR THE EXAMINATION OF DOCUMENTS UNDER DOCUMENTARY CREDITS (ISBP) 9 (2003) (providing a compilation of "standard banking practice for all parties to a documentary credit" that is consistent with the UCP and the "Opinions and Decisions of the ICC Banking Commission"); ICC Banking Comm'n, *Policy Statement: The determination of an 'Original' document*, *supra* note 42; Comm'n on Banking Technique and Practice, *Transferable Credits and the UCP 500* (Oct. 30, 2002), available at http://www.iccwbo.org/home/statements_rules/statements/2002/transferable_credits_and_the_UCP_500.asp.

44. DOCDEX is a highly specialized documentary credit subsidiary of the ICC's world-renowned arbitration center. Int'l Chamber of Commerce, International Court of Arbitration, at http://www.iccwbo.org/index_court.asp; see also Int'l Chamber of Commerce, DOCDEX: Dispute Resolution Services, at http://www.iccwbo.org/drs/english/docdex/all_topics.asp.

45. See Int'l Chamber of Commerce, *ICC Rules for Documentary Instruments Dispute Resolution Expertise*, art. 1.2 (Mar. 15, 2002), <http://www.iccwbo.org/drs/english/docdex/>

that “many judges, arbitrators, and lawyers have difficulty understanding the intricacies of everyday letter of credit practice.”⁴⁶ In contrast to other alternate dispute resolution fora, the Banking Commission maintains for DOCDEX a pool of arbitrators with highly technical, documentary credit expertise.⁴⁷ While the expert arbitrators, rather than the Banking Commission, decide individual cases, the Banking Commission maintains effective control and must approve all decisions to assure conformity with its interpretation of the UCP.⁴⁸

5. *Legal Status of the UCP*

The UCP 500’s legal status is an enigma. On the one hand, it does not satisfy any technical definition of international law. It is not a treaty because it is not an “agreement concluded among states”;⁴⁹ nor is it customary international law, for custom remains the province of state lawmakers and usually is relegated to general norms, as opposed to specific, technical rules.⁵⁰

all_topics.asp#rules [hereinafter DOCDEX Rules] (“DOCDEX is made available by the . . . ICC through its International Centre for Expertise . . . under the auspices of the ICC Commission on Banking Technique and Practice (Banking Commission).”).

46. Int’l Chamber of Commerce, Service Launched for Resolving International Letter of Credit Disputes (Sept. 26, 1997), at http://www.iccwbo.org/home/news_archives/1997/letter_credit_dispute.asp. See DOCDEX Rules, *supra* note 45, art. 1.1.

47. See DOCDEX Rules, *supra* note 45, art. 6.1 (“The Banking Commission will maintain internal lists of experts having profound experience and knowledge of the applicable ICC Rules”); see also Int’l Chamber of Commerce, Service Launched for Resolving International Letter of Credit Disputes, *supra* note 46.

DOCDEX also distinguishes itself as relatively inexpensive and expeditious. See DOCDEX Rules, *supra* note 45, app. (\$5000 fee for disputes concerning letters of credit under \$500,000, inclusive of administrative expenses and arbitrator fees; the fee goes up to \$10,000 if the letter of credit in question exceeds \$500,000). In comparison, the fees for the ICC’s general arbitration services are rather steep. Int’l Chamber of Commerce, International Court of Arbitration; Costs of Arbitration, at <http://www.iccwbo.org/court/english/arbitration/costs.asp>. See DOCDEX Rules, *supra* note 45, art. 7.4, (issue decision within thirty days of completed request, answer, and supplemental information); Int’l Chamber of Commerce, Service Launched for Resolving International Letter of Credit Disputes, *supra* note 46 (response within six to twelve weeks of completed application). DOCDEX follows a streamlined version of rules issued by a number of arbitral institutions, offering both Claimant and Respondent an opportunity to present arguments and evidence in written form. See DOCDEX Rules, *supra* note 45, arts. 2 & 3. The Rules also delineate procedures for the appointment of arbitrators (experts), *id.* art. 6, and for the issuing of decisions, *id.* art. 8.

DOCDEX decisions are not binding on local courts unless the parties choose otherwise. See DOCDEX Rules, *supra* note 45, art. 1.4; Int’l Chamber of Commerce, Service Launched for Resolving International Letter of Credit Disputes, *supra* note 46 (asserting that the “non-binding nature of the basic procedure is intended to provide banks with the alternative to litigation of a highly-reliable expert system which is nonetheless not obligatory”). Nonetheless, the ICC hopes that “any court called upon to hear a case involving a credit would give great weight to any DOCDEX decision introduced into evidence.” *Id.*

48. DOCDEX is administered through the International Centre for Expertise under the auspices of the ICC Banking Commission. DOCDEX Rules, *supra* note 45, art. 1.2. Once the appointed experts arrive at a decision, a Technical Adviser of the Banking Commission must approve it, assuring conformity with the applicable ICC rules governing documentary credits. *Id.* art. 1.3. In addition, the arbitrators rely heavily on Banking Commission opinions in reaching their decisions. See generally INT’L CHAMBER OF COMMERCE, COLLECTED DOCDEX DECISIONS 1997-2003: DECISIONS BY ICC EXPERTS ON DOCUMENTARY CREDIT DISPUTES (Gary Collyer & Ron Katz eds., 2004) (compiling first thirty-first decisions that the DOCDEX panels released).

49. See *supra* note 1 for definition of treaty-based international law.

50. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 2, § 102(2) cmt. b (“Customary international law results from a general and consistent practice of states followed by them

Most international legal scholars would classify the UCP 500 as mere soft international law, primarily because it does not fit into any of the hard international law categories.⁵¹

On the other hand, exporters and importers almost universally identify the UCP 500 as their choice of law.⁵² Banks and banking associations proclaim their adherence to the UCP rules,⁵³ and many banks will not issue letters of credit unless the parties explicitly state that the UCP 500 governs within the four corners of the letter.⁵⁴ Most telling of all, domestic courts, which are frequently called upon to hear actual letter-of-credit disputes, apply the UCP 500 even in the face of a domestic statute designed for related issues. Functionally and technically, the UCP 500 has become hard law.⁵⁵

This climb, from merely soft, practical standards to real, hard law is evident in the Banking Commission's evolving self-image. When it first published the UCP, the Banking Commission warned that its opinions had no binding legal effect and should not be cited in such a manner.⁵⁶ Soon thereafter, the Commission retreated a bit, still conceding that its opinions had no legal force but nonetheless characterizing such opinions as authoritative.⁵⁷ Recent volumes of Banking Commission opinions, however, do not address whether or not the opinions are legally binding; rather, they explain how and for what purpose the opinions should be used—namely for creating internationally uniform assessments of “a set of documents’ acceptability” to harmonize expectations and enhance market stability.⁵⁸ In fact, the Banking

from a sense of legal obligation . . . includ[ing] diplomatic acts and instructions as well as public measure and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states.”); see also *infra* notes 201-207 and accompanying text.

51. While the “soft law” label means that the UCP 500 is not a binding (or hard) form of international law, *supra* note 3, it does not affirmatively illuminate its legal, normative, or substantive standing.

52. Rowley, *supra* note 4, at 2242-43 n.39 (“recognizing that the UCP are ‘used in most international letters of credit’ . . . and that UCP are ‘usually incorporated into letters of credit, particularly international letters of credit’” (citing Prefatory Note to U.C.C. Revised Article 5 (1995))).

53. SCHUTZE & FONTANE, *supra* note 21, at 13 (“[I]t had become good practice among banks around the world to express their adherence to the UCP.”).

54. See, e.g., DE ROOY, *supra* note 14, app. B.4 at 206 (specimen letter of credit).

55. For excellent discussions of the UCP as law, see Snyder, *supra* note 14, at 393-95; Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 10 HARV. INT’L L.J. 221, 251 (1978).

56. See DECISIONS (1975-1979), *supra* note 41, inside cover.

57. See, e.g., OPINIONS (1998-1999), *supra* note 41, at 3 (noting that a decision “has been successfully used in court cases”).

58. It has been said that a set of documents could be placed in front of, say, six different, but equally experienced document examiners and one could expect to receive a like number of different responses on their acceptability or lack thereof. . . . Responding to questions and issues raised by bankers, exporters, importers, shipping companies, freight forwarders and lawyers, the Opinions themselves reflect ‘international practice’ in their interpretations of stated circumstances and/or document(s) presented. . . . Readers are strongly advised to read, understand and implement the principles expressed in these pages, so that the differences in interpretation between one office and another—and one bank and another—will be narrowed even more.

OPINIONS (1997), *supra* note 41, at 3.

Commission recently noted that courts use its official documents to resolve live disputes.⁵⁹

More significant than the legal weight that the Banking Commission gives to its own rules and decisions is the fact that many courts, in the United States and elsewhere, rely on the UCP 500, and even Banking Commission opinions, as legal rules of decision. This reliance is especially notable in the United States, given that Article 5 of the Uniform Commercial Code (U.C.C.) explicitly covers documentary credits.⁶⁰ Consider the following illustrative case that came before a U.S. district court in Texas a few years ago. A U.S. exporter entered into a contract with a Chinese importer for the sale of a hazardous chemical.⁶¹ The importer opened a letter of credit at the Bank of China in favor of the exporter and chose the UCP 500 as the governing law.⁶² Unfortunately, the letter of credit had several typographical and other technical mistakes.⁶³ When the Bank of China received the documents, it

59. OPINIONS (1998-1999), *supra* note 41, at 3 (noting that the Banking Commission decision on what constitutes an original document "has been used successfully in court cases involving disputes regarding the question of originality").

60. U.C.C. art. 5 (1995). In fact, the UCP 500 greatly influenced the 1995 revision of U.C.C. Article 5, effectively internationalizing the correspondent U.C.C. sections. See James J. White, *The Influence of International Practice on the Revision of Article 5 of the U.C.C.*, 16 NW. J. INT'L L. & BUS. 189 (1995) (discussing the influence of the UCP on several Articles in the revision of the U.C.C.); James G. Barnes, *Internationalization of Revised U.C.C. Article 5 (Letters of Credit)*, 16 NW. J. INT'L L. & BUS. 215 (1995). In some jurisdictions, a state's adoption of revised Article 5 includes explicit deference to the UCP 500 whenever the parties to a letter of credit choose it as their rule of law. In these jurisdictions, the U.C.C. does not apply when (1) the parties choose the UCP 500 as their governing law; and (2) the issue falls within the scope of the UCP 500. See N.Y. U.C.C. § 5-101 (McKinney 2001); ALA. CODE § 7-5-101 (1997); ARIZ. REV. STAT. ANN. § 47-5101 (West 1997); MO. ANN. STAT. § 400.5-101 (West 2002). In these jurisdictions, when a dispute arises under a UCP 500 choice-of-law clause, the court's analysis is decidedly centered on the UCP 500. See Dale Joseph Gilsinger, *Annotation, Validity, Construction, and Application of the Uniform Customs and Practice for Documentary Credits (UCP)*, 56 A.L.R.5th 565, 602-5 (1998) (citing, e.g., *Fidelity & Deposit Co. v. FDIC*, 54 F.3d 507 (8th Cir. 1995); *Bergerco Canada, a Div. of ConAgra, Ltd. v. Iraqi State Co. for Food Stuff Trading*, 924 F. Supp. 252 (D.D.C. 1996), *rev'd on other grounds*, 129 F.3d 189 (D.C. Cir. 1997); *Carol Ruth, Inc. v. Provident Life and Acc. Ins. Co.*, 1995 WL 130530 (S.D.N.Y. 1995), *aff'd*, 101 F.3d 683 (2d Cir. 1996)).

In other instances, a state may adopt a version of Article 5 that does not explicitly defer to the UCP 500 but implicitly does so, looking toward international banking practice to determine the parties' legal obligations. See, e.g., TEX. BUS. & COM. CODE ANN. § 5-108(a) & (e):

[A]n issuer shall honor a presentation that, as determined by the standard . . . appears on its face strictly to comply with the terms and conditions of the letter of credit . . . An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice.

Consequently, one should often look to the UCP 500 as a way of determining trade usages and customs. See *Philadelphia Gear Corp. v. Central Bank*, 717 F.2d 230 (5th Cir. 1983) (looking at the UCP to determine trade usage to answer a question regarding amendment procedures); *AMF Head Sports Wear, Inc. v. Ray Scott's All-American Sports Club, Inc.*, 448 F. Supp. 222 (D. Ariz. 1978) (looking to the UCP to determine whether parties could amend a letter of credit); *Mantua Mfg. Co. v. Commerce Exch. Bank*, 661 N.E.2d 161, 166 n.6 (Ohio 1996) (looking to the UCP as a "written trade code or similar writing," to determine who qualified as a customer).

61. *Voest-Alpine Trading USA Corp. v. Bank of China*, 167 F. Supp. 2d 940 (S.D. Tex. 2000), *aff'd*, 288 F.3d 262 (5th Cir. 2002).

62. *Id.* at 942.

63. The mistakes included (1) listing the name of the beneficiary incorrectly; (2) misspelling the destination port; and (3) assigning the wrong letter-of-credit number in the beneficiary's faxed certified copy. *Id.* at 943.

reviewed them, identified the discrepancies, and ultimately denied payment under the letter of credit.⁶⁴ The exporter sued the Bank of China for payment in U.S. federal court.

The question before the Court was whether the Bank of China had breached its legal obligation to pay the exporter upon receipt of documents that complied in substance, but not in technicality, with the terms of the letter of credit. In answering this question, the Court stated unequivocally that the UCP 500 is the controlling legal standard because local law, the U.C.C.-based state commercial code, identifies standard practice as the arbiter of the documents' compliance with the letter of credit's terms.⁶⁵ The UCP 500 qualifies as standard practice when the parties affirmatively choose it to govern the letter of credit.⁶⁶ In this particular case the Court looked as well at Banking Commission opinions to illuminate the UCP 500's rules.⁶⁷ While

64. Bank of China's telex stated, "We are contacting the applicant [JFTC] of the relative discrepancy [sic]. Holding documents at your risks and disposal." The Bank sent a subsequent telex several days later, noting that Article 13 of the UCP 500 creates a "definite undertaking" by the issuing bank to pay the beneficiary (Voest-Alpine) as long as the documents comply "with the terms and conditions of the credit." The Bank stated: "[T]he discrepant documents may have us refuse to take up the documents according to article 14(B) of UCP 500." *Id.* at 943.

65. *Id.* at 944; see also TEX. BUS. & COM. CODE ANN. § 5-108(a) & (e). The Texas approach is consistent with the current version of the U.C.C. The case in question deals with the Bank of China's refusal to pay in the face of discrepant documents, and the U.C.C. clearly defers to standard practice in unpacking the precise contours of the obligation. Standard practice includes "international practice set forth in or referenced by the Uniform Customs and Practice [UCP]" as well as "other practice rules published by associations of financial institutions" and "local and regional practice." U.C.C. § 5-108(e) cmt. 8 (1995). When standard practice of different jurisdictions conflicts, the parties may choose a practice by reference in the letter of credit itself. *Id.*

66. *Bank of China*, 167 F. Supp. 2d at 944.

67. First, the Court determined through scrutiny of the wording of the Bank of China's communications with Voest-Alpine that, while the Bank of China certainly communicated with Voest-Alpine within seven days of receipt of the documents, the timely communication did not constitute a notice of refusal, as the UCP requires. *Id.* at 944-45 (citing UCP 500, *supra* note 15, art. 14(d), at 20, which states that "[i]f the Issuing Bank . . . decides to refuse the documents, it must give notice to that effect . . . no later than the close of the seventh banking day following the day of receipt of the documents"). The Court then held that a failure to comply with the UCP's notice provisions divested the issuing bank of the right to refuse payment on the basis of discrepant documents. *Id.* at 945 (citing UCP 500, *supra* note 15, art. 14(e), at 20, which states that an issuing bank that fails to issue a formal notice of refusal within seven days "shall be precluded from claiming that the documents are not in compliance with the terms and conditions of the Credit"). Thus, the Bank of China had a legal obligation to pay the credit.

The Court also examined each individual discrepancy to see whether it violated standard practice as determined by reference to the UCP. In this case, standard practice required that issuing banks examine documents with "reasonable care" to "ascertain whether or not they appear on their face" to comply with the "terms and conditions of the Credit." UCP 500, *supra* note 15, art. 13(a), at 19. The UCP 500 continues in a somewhat tautological fashion, stating that "[d]ocuments which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in compliance with the terms and conditions of the Credit." *Id.* art. 13(a), at 19. The *Bank of China* Court appropriately noted that the UCP 500 does not "mandate that the documents be a mirror image of the requirements or use the term 'strict compliance'"; nor does it "provide guidance" on the types of discrepancies that "would justify a conclusion on the part of a bank that the documents are not in compliance with the terms and conditions of the letter of credit." *Bank of China*, 167 F. Supp. at 946. Thus, the Court was left with no clear statutory, UCP, or other guidance on the legal standard applicable to technically discrepant documents.

For interpretive assistance, the Court significantly turned to an opinion of the ICC Banking Commission on the UCP 500's standard for examining documents. *Id.* at 947. In entertaining a constituent question regarding the meaning of "inconsistency," the Banking Commission had determined that "consistency" merely requires "that the whole of the documents must obviously relate to the transaction covered by the credit and not be inconsistent with one another." DECISIONS (1975-1979),

Bank of China is just one illustrative case; it is generally indicative of the way that U.S. courts draw the UCP 500 into their analysis.⁶⁸ While a systematic look at foreign legal systems' treatment of the UCP 500 is beyond this Article's scope, the UCP 500 appears to be the preeminent set of rules for settling disputes related to letters of credit in many other countries as well.⁶⁹

From the drafting rooms of the Banking Commission to the published opinions of judges, the UCP has undoubtedly hardened from business practice into law. Some might argue that the UCP 500 has acquired the status of domestic law in the United States by virtue of its strong influence on court decisions.⁷⁰ Others might label the UCP 500 a transnational commercial code or a modern *lex mercatoria*.⁷¹ Regardless, the process by which the banks and the Banking Commission have created law has been markedly distinct from classic international law stories—private parties, rather than diplomats, are the engine; the rules, firmly rooted in practice, are maintained by the same practitioners; and, while not punctuated by formality or ceremony, the rules eventually ascend to the realm of hard law.

B. *The Berne Union and Export Credit Insurance*

1. *The Financial Instrument*

Export credit insurance is like automobile insurance, except that the asset the insurance company protects is not a car but rather a trade receivable. Like the letter of credit, export credit insurance solves the fundamental

supra note 41, at 23 (interpreting Article 7 of the UCP 290, which states that "documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in accordance with the terms and conditions of the credit"). The Court cited this Banking Commission opinion in embracing a "moderate, more appropriate" standard by which to assess technicalities and typographical errors. *Bank of China*, 167 F. Supp. 2d at 947. Obvious misspellings or misstatements of names do not warrant rejection. *Id.* at 948 (inverting the name of the applicant in the letter of credit (Voest-Alpine Trading USA v. Voest-Alpine USA Trading) did not warrant rejection of the credit); *id.* at 949 (misspelling of the destination on the certificate of origin did not invalidate the credit). A document stamped "duplicate" or "triplicate" does not violate the terms of a credit that requires original documents as long as the documents are in fact originals, with original signatures and clearly intended to be executed in multiples. *Id.* at 948-49 (citing OPINIONS (1995-1996), *supra* note 41, at 38, where the Banking Commission declared that "duplicate" or "triplicate" bills of lading and packing lists may be deemed original documents as long as they bear original signatures). A clearly unintentional typographical error in the letter-of-credit number, in the face of several documents that state the number correctly, does not warrant rejection either. *Bank of China*, 167 F. Supp. 2d at 949.

68. See, e.g., *Atari, Inc. v. Harris Trust & Sav. Bank*, 599 F. Supp. 592 (D. Ill. 1984) (applying UCP in face of conflicting provision of U.C.C.); *W. Intl. Forest Prods., Inc. v. Shinhan Bank*, 860 F. Supp. 151, 153-54 (S.D.N.Y. 1994) (looking to Banking Commission opinions to determine whether "strict compliance" requires an original, rather than duplicate, document); *Ultra Scope Intl., Inc. v. Extebank*, 158 Misc. 2d 117, 121 (N.Y. App. Div. 1992) (looking at Banking Commission decisions to determine what the term "stale" means in a letter of credit).

69. See generally SCHUTZE & FONTANE, *supra* note 21 (noting that when parties to a letter of credit choose the UCP 500 in the choice-of-law clause for the letter of credit, courts generally defer to this selection; also noting that national law is a mere backup in case the UCP is silent or unclear on the letter-of-credit issue at hand; also citing several countries which have incorporated the UCP or UCP-influenced rules into their domestic statutes regarding letters of credit).

70. Justice Holmes considered law to be any rule that "predicts how a court will act." Snyder, *supra* note 14, at 373 (citing Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1896)); see also White, *supra* note 60, at 189.

71. See, e.g., DE ROOY, *supra* note 14, at 15-17; Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT'L L. 305, 306 (2001).

exporter problem—how to extend credit to a buyer who might be thousands of miles away without stifling the seller's ability to engage in further trade transactions. With the backing of an insurance provider, which may be a private insurance company or a government-backed ECA, an exporter may extend credit to an importer without significantly adding to its risk portfolio.⁷² Where liquidity is an issue, the backing of an export credit insurer enhances the exporter's ability to monetize the receivable, by either selling it or borrowing against it (i.e., using the receivable to secure a loan).⁷³ A bank's decision to buy an insured receivable, or accept an insured receivable as security for a loan, depends to a large degree on its confidence in the export credit insurer.

Yet the value of an insured receivable as a marketable asset or as loan collateral also depends on the extent to which payment on a future insurance claim is conditional on the underlying credit of the policyholder. With automobile insurance, a policyholder who files a claim following an accident but has not paid the premiums or filed a police report loses the protections of the insurance policy. Likewise, export credit insurance is a conditional product. Claims will be paid only when the policyholder—an exporter (or a bank via assignment)—has satisfied certain ongoing obligations during the term of the insurance policy and followed certain procedures upon the filing

72. Most export credit insurance covers both political and commercial risks (generally known as comprehensive insurance), although exporters may choose to purchase "political only" insurance (covering the risk of political violence, government intervention, cancellation of an export or import license, or transfer/inconvertibility risk). See EXPORT-IMPORT BANK OF THE UNITED STATES (EX-IM BANK), OVERVIEW OF THE EXPORT-IMPORT BANK OF THE U.S. EXPORT CREDIT INSURANCE PROGRAM (2001) [hereinafter OVERVIEW OF EX-IM BANK]. Comprehensive insurance at Ex-Im Bank includes "coverage against specified political risks such as war, revolution, expropriation or confiscation by a government authority, cancellation of import or export licenses after shipment and foreign exchange inconvertibility, and commercial losses due to protracted default, insolvency of the buyer or failure to reimburse for other reasons. Devaluation is not covered as a political risk." Ex-Im Bank, Ex-Im Bank Financial Institution Buyer Credit Export Insurance, at <http://www.exim.gov/products/insurance/-buyercredit.html> (last visited Dec. 12, 2004). The Overseas Private Investment Corporation (OPIC) provides political risk insurance for U.S. foreign investment, but this Article is concerned primarily with international trade and will not deal in any significant way with investment insurance. See Overseas Private Investment Corp., Insurance Department, at <http://www.opic.gov/Insurance/>.

Some export credit insurance policies have first-loss deductibles similar to those found in car or medical insurance policies. See, e.g., OVERVIEW OF EX-IM BANK, *supra*, at 7 (describing multi-buyer and single-buyer policies). Export credit insurers offer a whole-turnover or multi-buyer policy, where an exporter may purchase insurance on a basket of foreign receivables. Alternatively, an exporter can purchase an insurance policy on a particular receivable, or a flow of receivables, from a particular buyer. See, e.g., Ex-Im Bank, Multi-Buyer Export Credit Insurance, at http://www.exim.gov/products/-insurance/multi_buyer.html (last visited Dec. 12, 2004); Ex-Im Bank, Short-Term Single-Buyer Export Credit Insurance, at http://www.exim.gov/products/insurance/single_buyer.html (last visited Dec. 12, 2004); see also U.S. Gov't Export Portal, Export Insurance and Risk Mitigation, <http://www.export.gov/expinsuring.html> (describing the insurance for export transactions and overseas investment insurance that Ex-Im Bank and OPIC, respectively, make available to U.S. businesses). Similarly, a financial institution that essentially loans money to a foreign buyer with the intent that the proceeds be used to pay an exporter (or to reimburse the borrower for funds already paid to an exporter) may purchase a policy to insure against default on the loan as a result of commercial or political risks. See Ex-Im Bank, Ex-Im Bank Financial Institution Buyer Credit Export Insurance, *supra*.

73. Collateralizing the receivable is sometimes referred to as "factoring." For instance, an exporter may assign an insured \$1000 receivable, payable in 180 days to a commercial bank, and the bank will give the exporter \$950 upon assignment. If all goes as planned, in 180 days the importer will pay the bank instead of the exporter and, if the importer pays in full, the bank will receive \$1000, making \$50 (5% return) on a six-month loan. Of course, if the importer does not pay, the bank must attempt to recover from the export credit insurer.

of a claim.⁷⁴ Export credit insurers have devised mechanisms to reduce the conditionality in their products when a bank assumes the receivable, so that banks can view claim payment as guaranteed.⁷⁵

Export credit insurance is, in one respect, more than simply an alternative to the letter of credit, employing an insurance company rather than a bank as an intermediary. It might actually be a more attractive option for some exporters seeking affordable means of credit risk management. Letters of credit can be expensive, particularly with buyers in riskier markets. Because insurance is a conditional product, insurance premiums are usually cheaper than the cost of a letter of credit. Banks' credit lines to certain countries are finite, especially in the face of a localized economic crisis; in these cases, the banks may simply lack the capacity to issue letters of credit. Furthermore, letters of credit generally accommodate only short-term trade transactions. Export credit insurance is much more flexible, accommodating any tenor (length of time between shipment and payment, which may be short-, medium-, or long-term) and thereby larger capital transactions.⁷⁶

2. *The Lawmaking Group: The Berne Union*

In 1934, a group of French, Italian, British, and Spanish export credit insurers met informally in a bar in Berne, Switzerland, to form what was

74. For export credit insurance products, these conditions typically include reporting to the insurer past due amounts on any receivable, filing a claim within a certain period following non-payment, making concerted efforts to mitigate losses, filing of certain declarations or forms, and payment of premiums. OESTERREICHISCHE KONTROLLBANK AG (Aus.), GENERAL BUSINESS CONDITIONS FOR GUARANTEES FOR DIRECT AND INDIRECT DELIVERIES AND SERVICES § 5.1 & 2 (1999); EXPORT DEV. CANADA, EXPORT PROTECT: SINGLE TRANSACTION ACCOUNTS RECEIVABLE INSURANCE § 5; EXPORT GUARANTEE AND INS. CORP. OF CZECH REPUBLIC, GENERAL INSURANCE CONDITIONS FOR EXPORT BUYER CREDIT INSURANCE AGAINST THE RISK OF NON-PAYMENT art. XIII.1(i); HUNGARIAN EXPORT CREDIT INS., LTD., SUPPLIER CREDIT INSURANCE FOR POST-SHIPMENT PERIOD pt. X.5; HONG KONG EXPORT CREDIT INS. CORP., COMPREHENSIVE COVER POLICY § V.13 & 14; COMPAÑÍA ESPAÑOLA DE SEGUROS A LA EXPORTACIÓN, BUYER CREDIT INSURANCE, GENERAL CONDITIONS art. 10; Ex-Im Bank, Report of Overdue Accounts for Short-Term Policies, <http://www.exim.gov/pub/ins/pdf/eib92-27.pdf>; see also Ex-Im Bank, Export Credit Insurance Policy art. V(E) (obligates the insured to use "all reasonable measures to prevent or minimize loss hereunder"); Ex-Im Bank, Short-Term Single-Buyer Export Credit Insurance, *supra* note 72.

75. For example, under Ex-Im Bank's scheme, when a financial institution loans money to a foreign buyer, either to pay a U.S. exporter (direct-buyer credit loan) or reimburse a foreign buyer for money that it paid up front to a U.S. exporter (reimbursement loan), Ex-Im Bank's insurance is documentary: as long as certain specified documents are in place, the financial institution does not bear the risk of exporter nonperformance, including fraud and disputes regarding the quality and conformity of the goods. In this sense, the financial institution deals in documents just like banks in a letter-of-credit transaction, and a bank which loans money to a foreign buyer is insured against non-payment as long as certain documents (as prescribed in the policy) are in order. Parenthetically, loans to suppliers are not documentary—if they were, the insurance policy would essentially insure against performance risk and could create perverse performance incentives for the exporter. See Ex-Im Bank, Financial Institution Buyer Credit Export Insurance, *supra* note 72.

76. The classification of international trade transactions by tenor is standard in the trade finance industry. Short-term trade usually involves the export of consumer products and some commodities, and typically involves payment within 180 days of shipment (sometimes as long as one year). Both export credit insurance and letters of credit may be used to facilitate and finance short-term trade. Medium-term trade typically involves capital goods with repayment terms of two to five years (sometimes slightly longer), and contract values usually do not exceed \$10 million. Long-term trade involves the export of large capital goods, sometimes entire plants, and is a catch-all category for transactions that are too large or that have repayment terms that are too long to fall into the medium-term category.

initially the Union of Insurers for the Control of International Credits, but which subsequently became known as the International Union of Credit and Investment Insurers, or the Berne Union.⁷⁷ The Berne Union's initial *raison d'être* was modest—the pooling of underwriting information (i.e., information regarding the creditworthiness of particular buyers) and the exchange of practical and technical experiences.⁷⁸

Following World War II, the Berne Union grew in size and role due to two convergent forces. The post-World War II boom in manufactured goods, particularly larger capital goods, increased exports of capital goods and the attendant demand for longer-term financing. The export credit insurance market grew to fill the expanding niche.⁷⁹ As with letters of credit, an export credit insurance transaction is by definition transnational and raises, especially with regard to financing and claim recovery, a host of cross-border issues that demand standardization and harmonization within the export credit insurance industry. Thus, with the increased use of export credit insurance came a parallel rise in the need for reliable underwriting and experiential information.

At the same time, ECAs strengthened their presence in the export credit insurance market.⁸⁰ Operating with the explicit charge of increasing national exports,⁸¹ ECAs began competing fiercely with each other during the early 1970s to offer importers increasingly attractive insurance products in the face of the widening trade deficits in the countries of the Organisation for Economic Co-operation and Development (OECD).⁸² Furthermore, this type of “race to the bottom” among financiers collided with the postwar liberal consensus that international trade should take place on a level playing field: exporters' success or failure should be based on the price and quality of their goods rather than the attractiveness of the export credit insurance available to

77. Peter C. Evans, *The Politics of State-Backed Trade Finance: Competition, Collusion and Redistribution in Official Export Credits* 42 n.149 (2004) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology) (on file with author); see also Hugh Dowell, *A Brief Historical Note—62 Years Ago, reprinted in* Facsimile from Berne Union to Janet Koven Levit (June 22, 2004) (on file with author).

78. See Evans, *supra* note 77, at 42 n.150; see also Telephone Interview with Kimberly Wiehl, Secretary-General, Berne Union (June 21, 2004) [hereinafter Secretary-General Wiehl Interview].

79. See generally Evans, *supra* note 77, at 42-43; see also Dowell, *supra* note 77.

80. Evans, *supra* note 77, at 43 nn.152-54 (describing the reinvigoration of official export credit agencies (ECAs), including statistics regarding the upsurge in official export credit activity) (citing BARBARA EPSTEIN, *POLITICS OF TRADE IN POWER PLANT: IMPACT OF PUBLIC PROCUREMENT* 30-37 (1971); Mark R. Greene, *Export Credit Insurance—Its Role in Expanding World Trade*, 32 J. OF RISK & INS. 177 (1965)).

81. See *infra* notes 126-140 and accompanying text for a discussion of ECA policies and practices.

82. Under the fundamental economic proposition that time is money, an exporter may win a sale if it can offer the importer a repayment term of seven years when a competitor offers only five years. The exporter's ability to offer this longer repayment term depends on a credit insurer's willingness to issue an insurance policy covering the term. ECAs started outbidding each other by offering more and more attractive insurance policies, adding greatly to their costs and the risk of their portfolio. See Evans, *supra* note 77, at 44-48 (describing the fierce competition, especially among the United States, the United Kingdom, Italy, and Germany); Janet Koven Levit, *The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits*, 45 HARV. INT'L L.J. 65, 75 (2004) (discussing the sharp rise in trade deficits in OECD countries).

them.⁸³ Thus, export credit insurers, private and public, also turned to the Berne Union in the name of collaboration toward a level playing field.

Today, the Berne Union's membership includes more than fifty export credit insurers, bringing together ECAs, private insurers, and investment insurers; members are primarily from OECD countries, but many are also from developing states.⁸⁴ Private insurers typically cover shorter-term transactions and, as purely profit-oriented entities, tend to take a more selective approach to riskier markets.⁸⁵ Public insurers, typically government-run or government-funded ECAs, in theory aim to supplement the private sector's capacity, insuring longer-term transactions in riskier markets under an overarching public policy of promoting national exports.⁸⁶

The Berne Union has a three-fold mandate: first, to promote "sound principles of export credit insurance" on an international level; second, to promote the exchange of information that will help Berne Union members build sound insurance practices; and third, to ensure the "establishment and maintenance of discipline in the terms of credit for international trade."⁸⁷ It is not an intergovernmental organization like the OECD, although many Berne

83. See John G. Ruggie, *International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order*, in *INTERNATIONAL REGIMES* (Stephen D. Krasner ed., 1983). This general view of the liberal economic order has been expressed repeatedly by government officials. See, e.g., Rita M. Rodriguez, *Ex-Im Bank: Overview, Challenges, and Policy Options*, in *THE EX-IM BANK IN THE 21ST CENTURY* 10 (Gary Clyde Hufbauer & Rita M. Rodriguez eds., 2001) (the Arrangement "succeeded in leveling the playing field for 'officially supported' export credits The age of blatant export credit subsidy competition among governments appears to be over."). Rita M. Rodriguez is a former director of Ex-Im Bank.

84. ECAs from all the OECD countries are members of the Berne Union. Private (as opposed to ECA) Berne Union members include AIG Global Trade & Political Risk (AIG) (U.S.), Atradius, Chubb Political Risk (U.S.), Euler Hermes SIAC (Italy), Euler Hermes U.K., FCIA Management Company Inc. (U.S.), PwC Deutsche Revision AG (F.R.G.), Sovereign Risk Insurance Ltd. (Berm.), and Zurich Emerging Markets Solutions (U.S.). Berne Union members from developing countries include China Export & Credit Insurance Corporation, Compañía Argentina de Seguros de Crédito a la Exportación, ECICS Ltd. (Sing.), Export Credit Guarantee Corporation of India Ltd., Export Credit Insurance Corporation of South Africa, Export-Import Bank of the Slovak Republic, Export-Import Bank of Thailand, Malaysia Export Credit Insurance Berhad, National Export-Import Bank of Jamaica Ltd., Seguradora Brasileira de Crédito à Exportação S/A (Braz), Sri Lanka Export Credit Insurance Corporation, and Credit Insurance Zimbabwe Limited. Berne Union, Berne Union Members, at <http://www.berneunion.org.uk/members.-html#Berne%20Union%20members> (last visited Dec. 12, 2004).

85. Jon Marks, *Supporting Trade In Difficult Times*, in *INTERNATIONAL UNION OF CREDIT AND INVESTMENT INSURERS, BERNE UNION YEARBOOK* 27 (2003), available at <http://www.berneunion.org.uk/Berne%20Union%20Yearbook%202003.pdf> [hereinafter *BERNE UNION YEARBOOK* 2003] (noting that private insurers typically support the shorter-term end of the market); see also Vivian Brown, *The Export Credit Agency in a Market Environment*, in *OECD, THE EXPORT CREDIT ARRANGEMENT: ACHIEVEMENTS AND CHALLENGES, 1978-1998* 103 (1998) [hereinafter *OECD, THE EXPORT CREDIT ARRANGEMENT: ACHIEVEMENTS AND CHALLENGES*] (noting that the private sector has taken an increasingly important role in export credit insurance); Ted Watson, *The Advance of the Private Sector in Short-Term Export Credit Insurance*, in *id.* at 159. For information on some private export credit insurers, see *BERNE UNION YEARBOOK* 2003, *supra*, at 176, 178, 181-82.

86. ECAs are government-owned and government-operated institutions that deliver official export credit support. Most industrialized countries have active ECAs. See, e.g., Harvard Business School, Export Credit Agencies, at <http://www.hbs.edu/besty/projfinportal/ecas.htm> (last visited Dec. 12, 2004) (providing links to ECAs around the world); see also *OECD, EXPORT CREDIT FINANCING SYSTEMS IN OECD MEMBER COUNTRIES AND NON-MEMBER ECONOMIES* (6th ed. 2001).

87. Int'l Union of Credit and Investment Insurers, *The Berne Union Agreements, Understandings and Obligations in the Export Credit Insurance Field: General Understanding* art. I(i) (2001) (on file with author) [hereinafter *General Understanding*]. See *infra* note 107 for a discussion regarding how the author obtained the General Understanding.

Union members are official ECAs. It is, nonetheless, a stand-alone institution. It has a staff of five, including a Secretary-General and Deputy Secretary-General, to maintain the working texts, develop technical expertise on a variety of insurance-related issues, and perform modest monitoring functions. The Berne Union's organizational structure mimics the formalities of many intergovernmental institutions, with biannual General Assembly meetings in roving destinations,⁸⁸ where members elect by a two-thirds vote a President, Vice President, and Management Committee.⁸⁹ Most of the Berne Union's work flows through three committees: Short-Term Export Credit Insurance, Medium and Long-Term Credit Insurance, and Investment Insurance.⁹⁰ The Berne Union is governed by statutes and promulgates acts, some of which look and feel like more traditional legal statutes.

Most Berne Union decisions require a supermajority vote of the membership at a General Assembly meeting. Three-quarters of the members must affirmatively vote to amend any Berne Union rule or statute or offer admission to a new member; two-thirds of the membership must vote to terminate membership or take action against a member.⁹¹ In order to become a member, a credit insurer must have been in business for at least three years; have annual premium income of at least \$5 million or a portfolio of at least \$450 million in insured risk; and meet certain minimum premium and risk portfolio thresholds in either its short-term, medium- and long-term, or investment insurance business.⁹²

3. *Substantive Rules*

At first glance, the Berne Union may appear to be a mere trade association, serving as a forum in which members develop and disseminate technical expertise. Yet it also actively regulates members' export credit practices, issuing rules on the types of insurance policies that members may issue and the terms that such policies may contain. These rules derive, in large part, from members' practical experiences, and they have been codified as the Berne Union General Understanding (General Understanding).⁹³

The General Understanding rules fall into three categories: (1) general discipline (rules to ensure that like insurers offer like terms); (2) sector agreements; and (3) reporting and exchange of information. First, the general discipline rules aim to level the export credit playing field by dividing the world of exportable goods and services into seven baskets, starting with raw materials and progressing to complete plants, that effectively reflect the

88. Meetings occur in countries where members volunteer to host. Facsimile from Secretary-General Wiehl, *supra* note 5. In the past three years, meetings have been in Mérida, Mexico City, Prague, Beijing, Biarritz, and Madrid. BERNE UNION YEARBOOK 2003, *supra* note 85, at 205.

89. See Berne Union, About the Berne Union, at <http://www.berneunion.org.uk/about.html> (last visited Dec. 12, 2004).

90. See BERNE UNION YEARBOOK 2003, *supra* note 85, at 191.

91. Secretary-General Wiehl Interview, *supra* note 78 (reading from Berne Union Statutes, which are not yet public documents).

92. *Id.*

93. See General Understanding, *supra* note 87.

divisions that have arisen over time in the export credit insurance business.⁹⁴ Within each basket, the Berne Union converts export credit insurance practice into sets of terms to be incorporated into export credit insurance offerings. For each of these term sets—Starting Point of Credit, Length of Credit, Down Payment, and Installments—the General Understanding provides concrete, technical rules designed to standardize the options that export credit insurers may offer to attract business. For instance, if an exporter asks a Berne Union member to insure the export of consumer goods, the General Understanding rules prohibit the member from supporting repayment terms in excess of six months, with the repayment clock starting to tick on the date the buyer accepts the goods.⁹⁵ If the exporter had been seeking to insure consumer durables, or parts and components, the Berne Union member would have faced different limitations on the repayment terms that it could support, with a different starting point triggering the transaction's repayment clock.⁹⁶ Through creating a virtual matrix for the export credit insurance universe, the General Understanding effectively translates insurers' experiences in calibrating transactions into a set of technical rules designed to discipline, limit, and standardize practice. Today, the Berne Union rules provide the only guidelines for the short-term end of the international trade market.⁹⁷

The second broad set of rules within the General Understanding incorporates a series of sector agreements concluded by the Berne Union members that supplement the general rules and understandings for particular export industries with industry-specific practices.⁹⁸ The Berne Union reviews sector agreements every three years, presumably to assure that the rules maintain a coincidence with actual industry practices.⁹⁹

Third, the Berne Union rules promote information exchange and transactional transparency. The Berne Union acts as a gatherer and conduit of information about industry practices. Insurers by nature rely on the accuracy of underwriting decisions, and export credit insurance is no exception. The Berne Union compiles and disseminates information obtained from members

94. The seven baskets are (a) raw materials, primary products, and semi-manufactures; (b) consumer goods and consumer services; (c) consumer durables, including related services; (d) parts or components, including related services; (e) quasi-capital goods, including related services; (f) capital goods and project services; and (g) complete plants. General Understanding, *supra* note 87, art. II, at 1.

95. *Id.* art. V(b), at 4.

96. *Id.* art. V(c) & (d), at 5-6. Obviously, if the member can only insure certain transactions for a certain length of time, the starting point becomes integral not only in calibrating the credit but also in maintaining discipline.

97. See *supra* note 76 for an explanation of how the trade finance industry defines short-term transactions as opposed to medium- and long-term trade.

Although the General Understanding covers all tenors of export credit insurance, the Berne Union has substantially diminished its disciplining role in the medium- and long-term market, allowing the Participants to the Arrangement to take the lead. See *infra* Part II.C. For an excellent explanation of why the Berne Union and the Participants Group divided responsibility in this manner, see Evans, *supra* note 77, ch. 3.

98. See, e.g., Berne Union, Short-Term Committee & Medium/Long-Term Committee, Sector Agreement on Paper, Pulp & Lumber (Oct. 2003); Berne Union, Short-Term Comm. & Medium/Long-Term Comm., Sector Agreement on Fertilizers, Insecticides, Pesticides & Fungicides (Oct. 2003); Berne Union, Short-Term Comm. & Medium/Long-Term Comm., Sector Agreement on Exchange of Information: Hides & Skins, Wool & Mohair (Oct. 2003). For codification of sector agreements, see General Understanding, *supra* note 87, art. VI(iv) (individual sector agreements on file with author).

99. General Understanding, *supra* note 87, art. VI, at 12.

regarding claims on public-sector and private-sector buyers,¹⁰⁰ payment problems in transactions financed by international institutions,¹⁰¹ and instances of fraud.¹⁰² It also compiles information on each member's credit insurance products; distributes members' annual reports to all those who, in turn, deposit their own annual report;¹⁰³ and maintains a registry of sources of credit information and debt-collecting agents, as well as an index of underwriting-related matters and ad hoc exchanges.¹⁰⁴ Finally, the rules contemplate bilateral exchanges of information between members via "contact points" and even prescribe the form and timing of requests and responses.¹⁰⁵

The General Understanding contains the stated norms, often quite technical in nature, that govern Berne Union members' export credit business. Yet within the Berne Union, a quite different substantive norm, albeit an unstated one, dominates all others—secrecy. As will be discussed further in Part IV, a veil of confidentiality shrouds the intricacies of the Berne Union's operations. No law review article or other scholarly piece has discussed the Berne Union rules at any length for the simple reason that the Union refuses to release the General Understanding.¹⁰⁶ The author's quest for the rules was a modern treasure hunt, with both the members and the Secretariat of the Berne Union repeatedly acknowledging the existence of the rules, but then refusing to release them. They clung to confidentiality in a way that revealed the normative weight that secrecy had assumed within the organization.¹⁰⁷

100. *Id.* art. X(i), at 19. The Berne Union requires that members report claims information on a particular form via e-mail. It annually compiles and circulates this information to all members.

101. *Id.* art. X(v), at 21.

102. *Id.* art. X(vi), at 21.

103. *Id.* art. X(ii), at 20 (reporting obligation on terms of country cover); *see also id.* art. XI(a)(i), at 21 (annual reports); *id.* art. XI(a)(ii), at 22 (members report on development in insurance schemes at committee meetings).

104. *Id.* art. XI(b)(i), at 22.

105. *Id.* art. VIII(a)(i), at 17 (time period for members to respond to questions from other members, including requirements on updating responses when no longer accurate); *id.* art. VIII(a)(ii), at 17 (specifying what information members should include in exchanges regarding contracts in negotiation, and requiring members to update all other members who received the information if it changes or upon further developments in the contract); *id.* art. XI(c), at 23 (designation of a member's contact point for bilateral exchanges).

106. Peter C. Evans, in preparing his dissertation, *supra* note 77, has prepared an exhaustive fourteen page bibliography of scholarly work pertaining to export credits. This bibliography does not contain any work on the Berne Union.

107. In February 2004, the author began contacting by e-mail, fax, and post the Berne Union Secretariat and Berne Union members, including Ex-Im Bank employees (since the rules influence the way Ex-Im Bank supports exporters in its short-term insurance program), about obtaining copies of the Berne Union agreements, rules, and understandings. The Union refers to these documents (with which the author was generally familiar due to her work with short-term credit insurance at Ex-Im Bank) on its website. Berne Union, About the Berne Union: Introduction, <http://www.berneunion.org.uk/-about.html#ACTIVITIES>. These attempts did not yield any information about the substantive rules for several months. The support staff at the Berne Union argued that the rules were the property of the members and that the institution did not have the right to disclose them; for their part, the Berne Union members argued that the rules were confidential and could not be disclosed to the public. After hitting what appeared to be a dead end, the author hired a law student to make a Freedom of Information Act (FOIA) request to see if Ex-Im Bank would disclose the Berne Union rules. Immediately before filing the FOIA request in May 2004, the author received the General Understanding from a contact at a Berne Union member ECA. It was sent without any confidentiality stipulations (indeed, this employee of the member ECA noted that she had received internal approval to release the General Understanding). Soon thereafter, the Secretary-General of the Berne Union, Kimberly Wiehl, began responding to the author's e-mails and faxes. The author conducted a telephone interview with Secretary-General Wiehl on June

Nevertheless, a consensus appears to be developing among some Berne Union members that such secrecy is out of sync with broader international norms that demand accountability and transparency of international institutions.¹⁰⁸

The Berne Union is an example of a small, niche lawmaking group bound by a type of stubborn, constitutional secrecy that clashes with prevailing international norms of accountability and transparency.¹⁰⁹ Yet the Berne Union does seem to be responding, if rather slowly, to normative

21, 2004. During the interview, the author informed Secretary-General Wiehl that she had received the General Understanding from a member. The Secretary-General was generous with her time and forthcoming with information over the phone; but she could not, due to the confidentiality and secrecy rules of the Berne Union, provide the author with hard copies of the rules. The Secretary-General referred to another document, the Berne Union Statutes regarding governance, operation, and decision-making within the Berne Union (as opposed to the substantive rules regarding the parameters of export credit insurance policies). The Secretary-General regretted that she could not provide the author with a hard copy of the Statutes due to confidentiality concerns, but she noted that she would answer all questions regarding internal procedures and decision-making honestly and accurately, presumably by revealing orally much of the substance of the Statutes. As Secretary-General Wiehl requested, the author sent her a courtesy draft of this Article early in the editing process. Approximately one month later, the Secretary-General raised many concerns about the Berne Union discussion, particularly regarding the General Understanding. Although a Berne Union member had released the document to the author, the Secretary-General noted that the release was "in violation of the Berne Union Code of Conduct." Facsimile from Secretary-General Wiehl, *supra* note 5. On November 16, 2004, Secretary-General Wiehl sent the author a press release issued the previous month that discussed a Berne Union "Value Statement" acknowledging the importance of "transparency." This document was the first press release the Berne Union had shared with the author, and it is the only press release posted on the Berne Union's website. Press Release, Berne Union, Three New Members Join the Berne Union (Oct. 2004), at http://www.berneunion.org.uk/press_release_Oct04.htm [hereinafter Berne Union Press Release]. See also *infra* note 110.

The mutual finger-pointing (members do not disclose rules because of the organization's confidentiality constraints, and the Berne Union does not offer rules because they belong to its members) may indicate internal ambiguity about what kind of entity the Berne Union actually is. Does the institution have, or should it have, interests and agendas independent of (and perhaps divergent from) any or all of its members? Or is the Berne Union a mere conglomeration of or clearinghouse for its members? Interestingly, in the course of the author's interviews with several Berne Union members, many of whom have asked to remain anonymous, it became clear that some members would like the Berne Union to assume more of an independent, institutional role. The Union represents that it has begun to assume an identity independent of its members and has started to take institutional positions on certain issues related to export credit insurance. Secretary-General Wiehl Interview, *supra* note 78; see also Kimberly Wiehl, *Flexible and Informed*, in BERNE UNION YEARBOOK 2003, *supra* note 85, at 17-18 (noting that the Berne Union is developing technical expertise in numerous areas, including the international bank capital adequacy framework established by the Basel Committee on Banking Supervision (Basel II) and environmental issues). The Berne Union's Secretariat is also proud of the technical expertise and resources it has developed regarding the short-term export credit insurance market, and it hopes that more formal international institutions such as the World Trade Organization (WTO) and the OECD will essentially "outsource" to the Berne Union when it becomes necessary to call upon such expertise. Secretary-General Wiehl Interview, *supra* note 78; see generally BERNE UNION YEARBOOK 2003, *supra* note 85 (with numerous articles showcasing the Berne Union's technical expertise in areas including the environment, reinsurance, bank capital adequacy standards, and small and new businesses); Berne Union Press Release, *supra* (noting the Union's active work on Basel II).

108. This view was also reinforced by phone interviews with several Berne Union members. Acknowledging that they could not release the rules because they were confidential, these members simultaneously noted that this confidentiality had no apparent functional purpose. They were at a loss about how to explain why the Berne Union continued to cling to confidentiality in its operations when institutions such as the OECD and WTO are opening up to public view. Nonetheless, and perhaps revealing the potency of the secrecy norm within the Berne Union, in each of these interviews the Berne Union member asked not to be quoted or cited when discussing his or her candid views regarding the value (or lack thereof) of secrecy.

109. See *infra* notes 307-328 and accompanying text for a discussion of accountability and transparency as important international norms.

pressure.¹¹⁰ The Berne Union may thus offer a promising example of international legal feedback mechanisms at work. While the Berne Union produces international norms and rules for export credit insurance and, in the process, has apparently adopted an informal code of secrecy, it is simultaneously informed by transcendent international norms generated in other international lawmaking fora. In this sense, the plots of bottom-up lawmaking stories may become intertwined with those of a more traditional, top-down genre. The ensuing stories—complex, multidimensional, and multidirectional—demonstrate how bottom-up and top-down international lawmaking may be mutually reinforcing and sustaining.

4. *Procedural, Interpretive, and Remedial Rules*

The Berne Union expects members to comply with its rules.¹¹¹ Nonetheless, the Berne Union has pragmatically institutionalized a transparent tolerance for noncompliance. As part of the General Understanding, members promise to notify other members, via the Berne Union, of any deviation from the General Understanding rules or the individual sector agreements.¹¹² This notification must follow a specified format,¹¹³ and in certain instances it triggers a reciprocity process whereby members may legitimately derogate from the Berne Union rules in order to match other members' noncompliance.¹¹⁴ The Berne Union Secretariat documents all notifications, reads the list publicly at General Assembly Meetings, and provides other members with an opportunity to comment.¹¹⁵ This notification scheme is designed to maintain transactional transparency and flexibility.

While the Berne Union notification process exists on the books, however, members do not frequently report derogations. Why might this be the case? One can only speculate. The first possible explanation is admittedly cynical but bears mention. Because the Arrangement effectively trumps the

110. For example, the Berne Union did grant the author an interview, somewhat reluctantly. See Secretary-General Wiehl Interview, *supra* note 78; see also *supra* note 107 and accompanying text. According to an October 2004 press release following the Berne Union's Annual General Meeting in Taipei, "Berne Union members fully appreciate the importance of communication and transparency, of good governance and of adopting strong ethical values in international trade." While this language was included in a discussion preceding a "Berne Union Value Statement," the Value Statement itself does not reference "transparency." The Value Statement reads: "We are committed to operate in a professional manner that is financially responsible, respectful of the environment and which demonstrates high ethical values—all in the best interest of the long-term success of our industry." Berne Union Press Release, *supra* note 107.

111. General Understanding, *supra* note 87, art. VI, at 12 ("All members are expected to adhere to the Berne Union Understanding and Agreements. If a member is not able to subscribe to any Understanding/Agreement, it is, nonetheless, committed at the outset to notify deviations to all members and the Secretary-General at the outset.").

112. *Id.* art. VIII(b)(i), at 18 ("[A]ny departures from Guidelines and the terms of a Sector Agreement . . . must be notified on a case by case basis before or immediately after a firm commitment by fax or e-mail to all members or Participants in Agreements . . ."); see also *id.* art. VI(i)(b), at 12.

113. *Id.* art. VIII(a)-(c), at 17-19, Annex II (Form N: Notification of Departures from Berne Union Guidelines and Agreements).

114. *Id.* art. VI(i)(b), at 12 ("Departures [from the rules] are allowed, subject to notification . . . to match conditions offered and confirmed by other members.") (emphasis in original).

115. Secretary-General Wiehl Interview, *supra* note 78 (noting, however, that these notification instances are relatively rare).

Berne Union rules in the medium- and long-term market,¹¹⁶ the General Understanding notification procedures apply only to short-term transactions with quick 180-day windows.¹¹⁷ Therefore, the insurers may not have the opportunity to report deviations, nor may other market players even be able to detect them, prior to the transaction's culmination.

The second possible explanation is that most members do in fact follow the rules, and thus have nothing to report; the research underpinning this Article favors this more favorable view of members' practices. In fact, the general consensus among ECAs, private insurers, and the Berne Union staff is that most of the insurers follow most of the rules most of the time.¹¹⁸ In telephone and e-mail interviews, members consistently pledged that they followed the Berne Union rules in their short-term export credit transactions.¹¹⁹ Documentary review of the members' export credit insurance policies and programs also revealed coincidence with the rules.¹²⁰

116. *See supra* note 97.

117. Admittedly, not all Berne Union members are Participants to the Arrangement, so the Berne Union procedures retain some viability in medium- and long-term transactions for Berne Union members who are not Participants. For the overwhelming majority of members, however, medium- and long-term export credits are governed by the Arrangement.

118. *Cf.* LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979) ("[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time . . .") (emphasis omitted).

119. Telephone Interview with Mr. Marchhert, Export Credit Insurance Manager, Oesterreichische Kontrollbank AG (Aus.) (June 30, 2004) (complies with the Berne Union rules and notifies the Berne Union when operating outside of the General Understanding parameters); Telephone Interview with Vincent Sinsky, Director of International Relations, Export Guarantee and Insurance Corporation (Czech Rep.) (June 30, 2004) (complies fully with the substantive Berne Union rules and the General Understanding notification process); Telephone Interview with Export Credit Manager, Eksport Kredit Fonden (Den.) (June 30, 2004) (when it engages in short-term financing (which is rare), company complies with Berne Union rules); Telephone Interview with Mrs. Jakobson, Manager of Export Credit Operations, Euler Hermes (F.R.G.) (July 1, 2004) (complies with Berne Union rules and provides relevant Berne Union notifications when issuing insurance that falls outside the scope of the General Understanding); Telephone Interview with Export Manager, Hungarian Export Credit Insurance Ltd. (July 1, 2004) (fully complies with Berne Union rules; has not had to utilize the Berne Union notification procedure because it has never offered insurance beyond the confines of the General Understanding); Telephone Interview with Elena Marchetti, Export Credit Insurance Manager, Istituto per i Servizi Assicurativi del Credito all'Esportazione (SACE) (Italy) (July 1, 2004) (complies with Berne Union rules and utilizes the notification process whenever SACE issues a policy that conflicts with the guidelines of the General Understanding); Telephone Interview with Manager of Export Credit Insurance, Sri Lanka Export Credit Insurance Corporation (July 6, 2004) (fully compliant with Berne Union); Telephone Interview with Uri Bernstein, Chief Executive Officer, The Israel Foreign Trade Risks Insurance Corporation Ltd. (IFTRIC) (July 9, 2004) (although IFTRIC does not offer short-term single-buyer credit insurance, it is Berne Union compliant. IFTRIC provides notice when it diverges from the General Understanding, but such divergence occurs only in the rarest of circumstances. In fact, according to Mr. Bernstein, it is extremely rare that "any" Berne Union member provides insurance outside of General Understanding parameters). Note that these interviews concerned only the short-term programs. The medium- and long-term programs are governed, for the most part, by the Arrangement rules. *See infra* notes 144-152 and accompanying text.

120. The author sent letters to each Berne Union member requesting a copy of their short-term export credit insurance policies to allow her to deduce compliance with the Berne Union rules. She is grateful that most of the members provided these policies to her. Many of these policies are quite generic because, as is typical in insurance, each policy's endorsement contains most of the transaction-specific terms that would indicate whether or not the policy in question complied with the General Understanding. However, some of the insurance policies did reveal through their boilerplate language that, at least at a programmatic level, the particular member was indeed complying with the Berne Union rules. Many of these policies are available on websites; the others are on file with the author. The following list (although not exhaustive) helps to indicate how insurance policies comply with the General Understanding, either in their specific provisions or more generally through reference to the

Berne Union. ECA policies include: OESTERREICHISCHE KONTROLLBANK AG (Aus.), GENERAL BUSINESS CONDITIONS FOR GUARANTEES FOR DIRECT (G1) AND INDIRECT (G2) DELIVERIES AND SERVICES (1999); OESTERREICHISCHE KONTROLLBANK AG, EXPORT GUARANTEES, RISK MANAGEMENT—SHORT TERM BUSINESS, *available at* <http://www.oekb.at/control/index.html?id=391373> (last visited Dec. 12, 2004) (consumer goods policies meet minimal requirements); DUCROIRE/DELCREDERE (Belg.), OVERALL AGREEMENT GENERAL TERMS (664-02); DUCROIRE/DELCREDERE, OVERALL AGREEMENT GENERAL REGULATIONS (654-02); SEGURADORA BRASILEIRA DE CRÉDITO À EXPORTAÇÃO (Braz.), SHORT-TERM OPERATIONS, *available at* http://www.sbce.com.br/site/productos/curto_prazo.php?PHPSESSID=07aa-16da8897c164986081664c9a6226 (last visited Dec. 12, 2004) (compliant in terms of length of credit, which range from 180 days to two years); EXPORT DEV. CANADA, ACCOUNTS RECEIVABLE POLICY (SHIPMENTS) GENERAL TERMS AND CONDITIONS; EXPORT DEV. CANADA, YOUR GUIDE TO ACCOUNTS RECEIVABLE INSURANCE (2003) (180-day length of credit is compliant); SINOSURE, CHINA EXPORT & CREDIT INS. CORP., SHORT-TERM EXPORT CREDIT INSURANCE, *available at* http://www.sinosure.com.cn/English/products_short.htm (last visited Dec. 12, 2004) (no specimen policy available, but Sinosure website contains an active link to the Berne Union website and an emblem indicating its observation membership status); EXPORT GUARANTEE AND INS. CORP. OF CZECH REP., GENERAL INSURANCE CONDITIONS FOR EXPORT BUYER CREDIT INSURANCE AGAINST THE RISK OF NON PAYMENT (2003); EXPORT KREDIT FONDEN (Den.), APPLICATION FOR EXPORT CREDIT GUARANTEE EXPORTER, *available at* <http://www.ekf.dk/SD159214-73DB-4967-82B3-C20709313FDE.W5Doc?-frames=no&> (last visited Dec. 12, 2004) (down payment and installment provisions are compliant with Berne Union); FINNVERA (Fin.), GENERAL CONTRACTUAL TERMS FOR LETTER OF CREDIT GUARANTEES (2002) (down payment requirement is compliant with Berne Union. Berne Union is explicitly mentioned in sample policy in the context of confidentiality assurance, which is tempered to the extent necessary to cooperate with other Berne Union members); EXPORT CREDIT INS. Org., GREECE EXPORT CREDIT INSURANCE PROGRAM, *available at* http://www.oaep.gr/english_init.htm (last visited Dec. 12, 2004); HONG KONG EXPORT CREDIT INS. CORP., COMPREHENSIVE COVER POLICY; HUNGARIAN EXPORT CREDIT INS. LTD., SUPPLIER CREDIT INSURANCE FOR POST-SHIPMENT PERIOD, GENERAL CONDITIONS (2002); HUNGARIAN EXPORT CREDIT INSURANCE LTD., BUYER CREDIT INSURANCE, GENERAL CONDITIONS (2002) (Part V (Risk Period) tracks credit starting point guidelines laid out in General Understanding); EXPORT GUARANTEE CREDIT CORP. OF INDIA LTD., SHIPMENTS (COMPREHENSIVE RISKS) OR STANDARD POLICY, *available at* <https://www.ecgcindia.com/portal/Data/English/Standard%20Policy.HTM> (last visited Dec. 12, 2004) (compliant in terms of length of credit, which does not exceed 180 days); SACE OF ITALY, GENERAL CONDITIONS (2000); NAT'L EXPORT-IMPORT BANK OF JAMAICA LTD., COMPREHENSIVE EXPORT SHIPMENTS POLICY (percentage of cover for commercial risks reflects observation of the Berne Union rules); NIPPON EXPORT AND INVESTMENT INS., (Japan), EXPORT CREDIT INSURANCE POLICY CONDITIONS (2002) (website indicates ECA's Berne Union membership since 1970); GIEK Kredittforsikring A/S (Nor.), WHOLE TURNOVER GUARANTEE POLICY (2002) (policy reference to installments and down payment falls within General Understanding requirements); KUKU S.A. (Pol.), ABCS OF KUKU S.A. INSURANCE PRODUCTS, *available at* <http://www.kuku.com.pl/eng/abc.html> (last visited Dec. 12, 2004) (for export receivables, both the Turn Over Policy and Europolicy are compliant with Berne Union requirements for the terms of the credit length); KOREA EXPORT INS. CORP., SHORT-TERM EXPORT INSURANCE, *available at* http://www.keic.or.kr/homepage2/english/A_KEICInBrief.html (last visited Dec. 12, 2004) (Post-Shipment, General Export Transaction) (1999) (website indicates company's active role as a Berne Union member; installment provision and 85% cover for non-letter of credit transactions illustrate Berne Union compliance); SLOVENE EXPORT CORP., PRODUCTS AND SERVICES, *available at* [http://www.sid.si/sidang.nsf/V/K32B5FD99EBCEB544C1256D66003F6AA0/\\$file/Products%20and%20services%20SEC.pdf](http://www.sid.si/sidang.nsf/V/K32B5FD99EBCEB544C1256D66003F6AA0/$file/Products%20and%20services%20SEC.pdf) (last visited Dec. 12, 2004) (15% down payment and 180-day length of credit terms are compliant with Berne Union); CREDIT GUARANTEE (S. Afr.), SHORT-TERM CREDIT INSURANCE, *available at* http://www.creditguarantee.co.za/X_Files/X_Pages/GuidetoShorttermExportCreditInsurance_10304.pdf (last visited Dec. 12, 2004) (website refers to the ECA's Berne Union membership and its close working relationship with the organization; indemnity coverage ranges from 75% to 80%, showing compliance with the down payment requirements outlined in the General Understanding); COMPAÑIA ESPAÑOLA DE SEGUROS DE CRÉDITO A LA EXPORTACIÓN (Spain), BUYER'S CREDIT INSURANCE, GENERAL CONDITIONS (maximum credit length and cover lie at the outer limits of the General Understanding but tend to indicate compliance); SRI LANKA EXPORT CREDIT INS. CORP., PROPOSAL FOR AN EXPORT PAYMENTS INSURANCE POLICY (indemnity coverage for commercial risks, 64% to 90%, is largely compliant with Berne Union down payment rules); EXPORTKREDITNÄMDEN (Swed.), GENERAL CONDITIONS FOR EXPORT CREDIT GUARANTEES IN RESPECT OF LOSS ON PRODUCTION AND LOSS ON CLAIM (1996) (policy lengths of six months to one year show compliance with Berne Union term requirements); EXPORT CREDITS GUARANTEE DEPARTMENT (U.K.), EXPORT INSURANCE POLICY (2004); EXPORT CREDITS GUARANTEE DEPARTMENT, PRODUCTS AND

What is the secret to the General Understanding's seemingly powerful influence over Berne Union member practices? First, considering the nature of the document (a mere compilation of the members' rules *based on their own practices*), members actually have no reason to deviate. In addition, the very culture of the organization facilitates compliance. The Berne Union operates as a club-like group within which members care about preserving their individual and institutional reputations and credibility. Member representatives know each other well and see each other with some frequency, not only at Berne Union meetings but also at some of the technical working groups of the IMF and World Bank, the WTO, and the OECD.¹²¹ In this type of small, close-knit group, informal enforcement mechanisms such as hallway gossip and chatter, or the practice of publicly noting deviant behavior at meetings, prove particularly effective.¹²²

5. *Legal Status of Berne Union Rules*

The Berne Union General Understanding is technically soft international law.¹²³ Many of its rules, however, have de facto become much harder. In fact, members themselves see these rules as more than guidelines or suggested best practices. This perception is evident not only in members' steadfast adherence to the rules but also in the General Understanding's presentation of its terms

SERVICES, available at http://www.ecgd.gov.uk/index/ps_home.htm (last visited Dec. 12, 2004) (15% down payment requirement is compliant with Berne Union); Ex-Im Bank, Exporter's Application for Short-Term Single Buyer Policy (2003), available at <http://www.exim.gov/pub/ins/pdf/eib92-64.pdf> (last visited Dec. 12, 2004); Ex-Im Bank, Short-Term Single-Buyer Export Credit Insurance, *supra* note 72 (180-day length of credit and 15% down payment requirement are compliant with Berne Union); Ex-Im Bank, Export Credit Insurance, available at <http://www.exim.gov/products/insurance/index.html> (last visited Dec. 12, 2004); Ex-Im Bank, Insurance Applications and Forms, available at <http://www.exim.gov/tools/appsforms/insurance.html> (last visited Dec. 12, 2004). For a sample of export credit insurance policies offered by private U.S. companies, see: FCIA MANAGEMENT COMPANY, INC., FCIA EXPORT CREDIT INSURANCE, POLICY TYPES AND KEY COVERAGE FEATURES, available at <http://www.fcia.com/exportinsurance.htm> (last visited Dec. 12, 2004) (all short-term policies comply with Berne Union length-of-credit requirements); FCIA MANAGEMENT COMPANY, INC., SHORT TERM SINGLE BUYER POLICY, available at <http://www.fcia.com/ExportCrSTSingleBuyerDatasheet1.htm> (last visited Dec. 12, 2004); ZURICH NORTH AMERICA, CREDIT INSURANCE, available at <http://www.zurichna.com/specialties/pr/Politica.nsf/pages/e45abf4258c5fa2385256a29005797be!OpenDocument> (last visited Dec. 12, 2004).

121. This type of cross-fertilization is patently evident in the following entries in the BERNE UNION YEARBOOK 2003, *supra* note 85: Horst Köhler, *Message from the IMF: Safeguarding Global Growth*, in *id.* at 13; Janet West, *Export Credits and the OECD*, in *id.* at 40; Peter Woicke, *Message from the IFC: Push and Pull of Capital Flows*, in *id.* at 15; James Wolfensohn, *Message from the World Bank: Delivering our Promises*, in *id.* at 10.

122. Lisa Bernstein, *Private Commercial Law in the Cotton Industry*, 99 MICH. L. REV. 1724, 1745-62 (2001) (noting the effectiveness of non-legal, reputation-based sanctions such as reporting names of those who refuse to use the industry-sanctioned arbitration tribunal and abide by its decisions); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1772 (1996) (discussing the National Grain and Feed Association's use of sanctioning mechanisms as reputational checks to assure that members comply with the mandatory arbitration rules). *But see* Avner Greif et al., *Coordination, Commitment, and Enforcement: The Case of the Merchant Guild*, 102 J. POL. ECON. 745, 751 (1994) (finding that reputational sanctions did not sufficiently deter rulers from discriminating against individual merchants in Medieval Europe; rulers faced no marginal cost to losing the business of one or even a few alien merchants, emphasizing the important of rulemaking in closed groups).

123. See *supra* note 3 and accompanying text.

as not mere underwriting decisions but rather commitments that may be breached only upon notification to other members.¹²⁴

Furthermore, and more significantly, through appropriation by the Arrangement, many Berne Union rules have hardened into law—international and domestic—applicable to export credit insurance and to the provision of other types of export credits. This contention will be illustrated as this Article further considers the relationship between the Berne Union rules and the Arrangement,¹²⁵ which borrows significantly both from the Berne Union's technical rules and from the overarching structure and processes followed by the rules. The Arrangement itself began as a piece of soft law, but through a lawmaking process similar to the two already discussed herein it has become progressively harder. Those Berne Union rules tied to the Arrangement have likewise hardened technically and functionally into law.

C. ECAs and the Arrangement on Officially Supported Export Credits

1. The Financial Instrument

With larger transactions, buyers typically demand extended repayment terms. While a consumer can buy a pair of shoes on thirty-day credit, an automobile may be purchased on five years of credit and a home mortgage may extend thirty years. These credit terms often track the useful life of the underlying asset. Likewise, the post-World War II growth in the international trade of capital goods,¹²⁶ from single pieces of equipment to entire plants, led to importer demands for longer and longer credit terms. Moreover, especially in the case of power-related and other infrastructure-related equipment, demand grew most quickly in developing countries. In these sectors, exporters faced an added dimension to the financing conundrum—the unwillingness of any private-sector intermediary, commercial bank, or insurance company to assume the risk of a transaction spanning a number of years in a market known for economic and political instability.

With official support for export credits, usually from an ECA, an exporter may effectively pass the risk of buyer default to the exporter's home government. Official export credit support can take a variety of forms, including a direct loan, an unconditional guarantee, or conditional export credit insurance.¹²⁷ If an exporter is looking not only for a risk-mitigation strategy but also for a way to maintain liquidity when selling goods on extended payment terms, the exporter must involve a bank to monetize the

124. For example, the General Understanding states that where the Arrangement permits longer credit terms than the Berne Union allows, any member's decision to take advantage of the more lenient Arrangement rules (e.g., by offering credit terms between the one-year General Understanding maximum and the two-year Arrangement ceiling) would constitute a deviation or derogation from the rules that would, in turn, demand notification. General Understanding, *supra* note 87, art. IX, at 19. What is interesting here is that the Berne Union's General Understanding, a product of its members maintained by its members, is not written as a discretionary set of guidelines. Rather, the text purports to be a set of strict rules with which members expect each other to comply in spite of a competing agreement that might be more lenient.

125. See *infra* note 175 and accompanying text.

126. See *supra* note 79 and accompanying text.

127. Levit, *supra* note 82, at 72 nn.26-28.

receivable. Given that banks are relatively risk-averse at the long end of the credit spectrum, their preferred official export credit instrument, at least in the United States, is the unconditional guarantee. With an official export credit guarantee, the ECA will back up a commercial bank's loan, which usually takes the form of a buyer credit extended to the importer. The importer then may use the loan proceeds to pay the exporter immediately; instead of paying the exporter over time, the importer now pays the bank over time. In the event of an importer default, the ECA makes the bank whole and attempts to recover against the importer.¹²⁸ From the bank's point of view, the only danger is that the ECA will not make good on its guarantee obligations (i.e., the government will renege on its debts)—a relatively small risk in OECD countries, whose ECAs are by far the most active in the market.¹²⁹

The involvement of an ECA is a mixed blessing. As government agencies, ECAs can fill a financing void by assuming credit risks that the private sector is unwilling to bear. Yet by the same token, these state organs also operate under certain policy constraints—primarily, ECAs support only their *own* exporters.¹³⁰ Consequently, prior to issuing a guarantee, the ECA not only engages in commercial due diligence but also must assure itself that the transaction satisfies certain government-mandated criteria.¹³¹

2. *The Lawmaking Group: The Participants to the Arrangement*

In the 1960s and 1970s, many ECAs attempted to stimulate exports by offering their exporters subsidized financing at below-market interest rates. The experience of these years illustrates how, in an unregulated world,

128. See *id.* at 75 fig. 1 (giving a schematic diagram of an ECA guarantee transaction).

129. ECA guarantees and insurance products are usually backed by the full faith and credit of the ECA's government.

130. For example, because Ex-Im Bank sees its mission in part as preserving "U.S. jobs through exports," it supports only actual U.S. exports—not mere re-exports of foreign goods or services (possibly packaged or assembled in the United States). Ex-Im Bank, Mission, at <http://www.exim.gov/about/mission.html> (proclaiming that the Bank's *raison d'être* is to "enable[e] U.S. companies—large and small—to turn export opportunities into real sales that help maintain and create U.S. jobs and contribute to a stronger national economy"); see also Export-Import Bank Act, 12 U.S.C. § 635(a)(1) (2002) ("The Bank's objective in authorizing loans, guarantees, insurance, and credits shall be to contribute to maintaining or increasing employment of United States workers"). See also note 131 *infra*.

131. Each ECA uses different criteria to determine whether a transaction is eligible for financing. Consider Ex-Im Bank. It is not an aid agency, and all loans, guarantees, and other forms of official export credit support must offer Ex-Im Bank a "reasonable assurance of repayment." *Id.* § 635(b)(1)(B). As a government agency, Ex-Im Bank is regulated and may not support exports unless (1) they are truly U.S. exports (and satisfy highly technical U.S. content rules, see *infra*); (2) their destination is "permissible"; (3) they will be used "legitimately"; (4) neither the exporter nor the importer is on any U.S. government "blacklist"; and (5) they will not facilitate the movement of U.S. jobs overseas. See Levit, *supra* note 82, at 74. The Bank's foreign content rules are rather technical, but in short they declare that: (1) goods or services must be shipped from the United States; (2) the goods or services must be produced in the United States; and (3) the contents of the goods and services (i.e., subcomponents) must be of U.S. origin. For goods of mixed origin, Ex-Im Bank will finance only the U.S. contents included in the transaction. For additional information, see Ex-Im Bank of the United States, Foreign Content Policy for Medium- and Long-Term Exports, at http://www.exim.gov/products/policies/foreign_content.html (last visited Dec. 12, 2004). Furthermore, as an engine of domestic economic growth and job creation (or preservation), Ex-Im Bank may support only exports that pass an additionality test: exporters must prove that their exports are incremental—the sale would not have happened but for Ex-Im Bank capital—and that Ex-Im Bank financing is not sought as a substitute for readily available private sources of financing. Levit, *supra* note 82, at 74.

especially one with mounting trade deficits, the natural tendency is for ECAs to offer relatively large subsidies to promote national exports. Yet such policies can trigger a costly, market-distorting war in export subsidies. Beginning in the early 1970s, coincident with the 1973 oil shock and the concomitant rise in the cost of subsidies, the industrialized ECAs and trade ministers came together to form a highly informal group (the Participants Group) to contemplate mutual restrictions on the subsidies that Participants could provide to exporters.¹³² These trade finance gurus coalesced under a common belief that competition was legitimate if based on the price of goods and services—not on the depth of government coffers available for subsidies at any particular moment. In the international trade world, this attempt to neutralize differing national advantages is referred to as creating a level playing field.¹³³

In 1978, the Participants Group took the first step toward codified self-regulation when it introduced the Arrangement,¹³⁴ which imposed modest caps on export subsidies.¹³⁵ In the ensuing decades, the Group has gradually pushed to broaden and deepen the Arrangement's scope. It is now a rather comprehensive regulatory code for ECA provision of export credit in the medium- and long-term ends of the market.¹³⁶

An organic relationship holds the Participants and the Arrangement together: the ECAs' actual business practices are the essence of the Arrangement, which, in turn, provides the vehicle for the incorporation of those practices into international and domestic law.¹³⁷ While each country's official representative to the Participants Group is a high-level trade official, the worker bees are often the ECA technocrats who bring particular expertise, knowledge, and experience to the table.¹³⁸ Political appointees come and go

132. For a discussion of the dynamics leading to the Arrangement's birth, see Andrew M. Moravcsik, *Disciplining Trade Finance: The OECD Export Credit Arrangement*, 43 INT'L ORG. 173 (1989) (examining the Arrangement's development from 1975 to 1985 from the perspective of the international relations theory of international cooperation). For a discussion of the Arrangement's "cooperative moment," see Levit, *supra* note 82, at 75-76, 95-100.

133. Gerhard Abel, *The Multilateral Trading System, the Export Credit Arrangement and the WTO*, in OECD, *THE EXPORT CREDIT ARRANGEMENT: ACHIEVEMENTS AND CHALLENGES*, *supra* note 85, at 15. See also Timothy F. Geithner, *The Economic Policy Benefits of International Co-Operation*, in *id.* at 87 ("The . . . Arrangement provides the multilateral forum in which Participants have collaborated to reduce the export financing subsidies offered by developing countries, thereby complementing successive rounds of negotiations to liberalize the world trading system within GATT and, now, the WTO. Arrangement work has also reinforced what can only be described as a global shift toward increased reliance on market forces generally—in both international and domestic economic policies"); Janet West, *Postscript*, in *id.* at 167 (noting that the Arrangement has gone far toward the goal of "setting a level playing field"); see *supra* note 83 and accompanying text.

134. See OECD, Arrangement on Officially Supported Export Credits, Doc. TD/PG(2004)(12), ch. I, General Provisions, at 7 (updated June 12, 2004), available at [http://webdomino1.oecd.org/olis/2004doc.nsf/43bb6130e5e86e5fc12569fa005d004c/ebd5e300c6faaf58c1256eb3002a44d5/\\$FILE/JT00166043.PDF](http://webdomino1.oecd.org/olis/2004doc.nsf/43bb6130e5e86e5fc12569fa005d004c/ebd5e300c6faaf58c1256eb3002a44d5/$FILE/JT00166043.PDF) (last visited Dec. 12, 2004) [hereinafter *The Arrangement*].

135. See JOHN E. RAY, *MANAGING OFFICIAL EXPORT CREDITS: THE QUEST FOR A GLOBAL REGIME* 45-63 (1995).

136. The Berne Union remains the dominant player in the short-end of the market. See *supra* note 97.

137. See *infra* notes 158-175 and accompanying text.

138. Telephone Interview with Jim Cruse, Vice President, Policy & Planning, Ex-Im Bank (June 28, 2004) (noting an informal inter-agency norm of deference to Ex-Im Bank's technical expertise).

over the years, but the global trade finance community is small, circumscribed in large part by the technicalities of the business, and the faces remain relatively constant. Consequently, those who attend Participants Group meetings tend to see each other at IMF, World Bank, and Berne Union meetings as well. In fact, the Arrangement was conceived in the hallways during an annual IMF and World Bank meeting.¹³⁹ As a result, this transnational network of trade finance technocrats has maintained itself as a relatively tight clique, with the mystique and camaraderie of an exclusive club.¹⁴⁰

3. *Substantive Rules*

The Participants Group makes all decisions on Arrangement-related matters through consensus, rather than mere majority.¹⁴¹ Consequently, the Arrangement's evolution has been rather conservative, incremental, and measured.¹⁴² Yet when one contemplates the Arrangement as an exercise in technocratic, governmental bottom-up lawmaking, it is evident that the text has closely tracked the Participants' collective practices and desires. Indeed, a June 2004 redrafting affirmed the aim of having the Arrangement capture, rather than displace, existing business practice: the Participants pledged to abide by "customary financial terms and conditions" within any particular industry.¹⁴³

The Arrangement's rules govern official support for most medium- and long-term transactions.¹⁴⁴ The Arrangement's substantive rules (or disciplines)

139. See Rolf Geberth, *The Genesis of the Consensus*, in OECD, *THE EXPORT CREDIT ARRANGEMENT: ACHIEVEMENTS AND CHALLENGES*, *supra* note 85, at 27-28; see also Moravcsik, *supra* note 132, at 180.

140. At last count, only fifty-one countries officially supported export credit through ECAs. Prior to May 1, 2004, the Participants Groups included twenty-four of those ECAs. See HARVARD BUSINESS SCHOOL, *supra* note 86. The European Community (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden, and the United Kingdom) is one of the Participants; and is in fact the only European Participant permitted to take official positions at official meetings. Over the years, those who have negotiated the Arrangement have described the process in decidedly "club-like" language. See, e.g., Eero Timonen, *The Birth of the 'Helsinki Package'*, in OECD, *THE EXPORT CREDIT ARRANGEMENT: ACHIEVEMENTS AND CHALLENGES*, *supra* note 85, at 51-52 ("Those present—Anthony Burger (Canada), Geb Ledeboer (The Netherlands), Kurt Schaerer (Switzerland), John Ray (the Secretariat) and myself—worked out the first proposal, the so-called 'Helsinki Package.' We were able to agree on the text in one day. Geb Ledeboer volunteered to serve as typist as we constructed the sentences. I remember him sitting at my PC, a large cigar in his mouth dropping ashes on the keyboard as he wrote. The work was done in genuine harmony and so swiftly that we had time to enjoy a sauna, dinner and drinks that evening.").

141. See Levit, *supra* note 82, at 101.

142. *Id.* at 101, 142-47 tbl. 1 (History of the Arrangement). While the Participants have made great progress in eliminating export credit competition, no consensus has formed regarding prominent areas such as agricultural exports, untied aid, regulation of market windows (and thus official support), and project finance.

143. The Arrangement, *supra* note 134, ch. II, Introduction, at 9.

144. *Id.* art. 5, at 7-8. While The Arrangement's rules have supplanted the Berne Union rules in the medium- and long-term markets, the Berne Union retains a monopoly on regulation of short-term export credit insurance. See also *supra* notes 76, 97 (definitions of the medium- and long-term markets; discussion of Berne Union's abdication of its role in the medium and long end of the market).

Some medium- and long-term transactions remain outside the Arrangement because special guidelines govern select industries. See Sector Understanding on Export Credits for Ships, The Arrangement, *supra* note 134, ann. I, at 34; Sector Understanding on Export Credits for Nuclear Power Plants, *id.* ann. II, at 38; and Sector Understanding on Export Credits for Civil Aircraft, *id.* ann. III, at

developed in a sedimentary manner, frequently codifying prevailing ECA practices such as: linking maximum repayment terms for long-term transactions to the creditworthiness of the borrower's country;¹⁴⁵ the definitions of transaction starting points;¹⁴⁶ requiring medium- and long-term borrowers to contribute a fifteen percent up-front cash payment;¹⁴⁷ mandating equal, semi-annual payments of principal and interest for medium- and long-term transactions;¹⁴⁸ and permitting borrowers to fold up to fifteen percent of the local costs of a transaction into the officially supported principal.¹⁴⁹

Other rules, particularly those that require simultaneous and mutual cooperation and restraint, are prescriptive and standard-setting. This latter type of rule may reflect the practices of some group members but it is really designed to mold behavior. As noted, the impetus behind the Arrangement was the mutual self-limitation of export subsidies in the name of resource management.¹⁵⁰ To this end, after much trial and error, the Arrangement virtually eliminated most interest-rate subsidies.¹⁵¹ Most recently, the

42. In addition, the Participants have experimented with special rules for project financings. Understanding on the Application of Flexibility to the Terms and Conditions of the Arrangement on Guidelines for Officially Supported Export Credits in Respect of Project Finance Transactions for a Trial Period (until Dec. 31, 2004), *id.* ann. X, at 74.

Official support includes support "by or on behalf of a government for export of goods and/or services, including financial leases." It may take the form of export credit guarantees and insurance; direct credits, refinancing, and interest rate support; or any combination thereof. *Id.* art. 5. The definition of "official support" has been of particular concern recently. Market windows are private financial institutions that enjoy significant government backing and thus are able to offer financing at below-market rates (similar to Fannie Mae's role in the U.S. mortgage market). Market windows, particularly in Canada and Germany, have been providing export trade finance on terms that are more flexible, and often more attractive from a domestic exporter's vantage point, than the Arrangement permits. See Rodriguez, *supra* note 83, at 10-17 (describing market windows in Canada and Germany and expressing concern on behalf of U.S. exporters); Allan I. Mendelowitz, *The New World of Government-Supported International Finance, in THE EX-IM BANK IN THE 21ST CENTURY*, *supra* note 83, at 170-80 (describing market windows in Germany and Canada). If market windows are not deemed "official support" of exports and if, indeed, they are effectively operating with government support and financing, market windows could create a back-door route to a new type of subsidized export credits and could undermine some of the Arrangement's achievements.

145. The Arrangement sets maximum repayment terms on the basis of a World Bank scheme that classifies borrowers as either category I (eligible for a maximum 8.5-year term) or category II (eligible for a maximum 10-year term). See The Arrangement, *supra* note 134, art. 12, at 10-11 & art. 10(a), at 9; See also *id.* ann. XI (List of Definitions), at 79. The country classification is based on a per capita income threshold designated by the World Bank. The 2001 World Bank threshold between category I and category II, which formed the basis of the Arrangement's 2002 classification, was \$5285 annual per capita income. See OECD, 2002 Country Classification for Export Credits and Tied Aid (July 24, 2002), available at <http://www.oecd.org/dataoecd/56/39/1946021.pdf>. The Arrangement also explicitly regulates the process for reclassifying countries from category I to category II. The Arrangement, *supra* note 134; see also Levit, *supra* note 82, at 114 n.228.

146. See The Arrangement, *supra* note 134, ann. XI, at 79; see also *supra* notes 94-97 (discussion of Berne Union starting point definitions and their role in calibrating transactions).

147. The Arrangement, *supra* note 134, art. 9, at 9.

148. *Id.* art. 13(a), at 11. Interest is not capitalized during the repayment period. *Id.* art. 14(a), at 11.

149. *Id.* art. 9, at 9. Local costs are expenditures for "goods and services in the buyer's country that are necessary . . . for executing the exporter's contract." *Id.* ann. XI (List of Definitions), at 79.

150. Levit, *supra* note 82, at 76 (noting that the impetus behind the Arrangement was, in great part, to limit the cost of export subsidies and thereby secure the position of ECAs).

151. It did so by defining and institutionalizing the Commercial Interest Reference Rate, or CIR, which is essentially a market-based rate. The Arrangement, *supra* note 134, art. 18(a), at 12. CIRs are 100 basis points above a base rate that is either the five-year government bond rate for all maturities, or a rate based on a three-tiered system that uses: the three-year government bond rate for

Arrangement standardized minimum premium rates, effectively prohibiting hidden subsidies through artificially low premiums.¹⁵²

4. *Procedural, Interpretive, and Remedial Rules*

Like the Berne Union General Understanding, the Arrangement institutionalizes notice and reporting procedures to ensure transparency and trust among Participants.¹⁵³ Participants are responsible for reporting deviations from the terms of the Arrangement on a transaction-by-transaction basis.¹⁵⁴ When a Participant makes a unilateral decision to deviate from the Arrangement for a particular transaction, that Participant must notify all other Participants, triggering a technical “notice-and-match” process that gives the other Participants the right to match a deviant offer.¹⁵⁵ Any Participant’s decision to match, like the decision to derogate, is unilateral and is itself subject to the notice-and-match process.¹⁵⁶ Similarly, “common lines” are consensual understandings among Participants to offer, usually on a transaction-by-transaction basis, terms that are more or less favorable than those permitted under the Arrangement, or to resolve ambiguities within the four corners of the Arrangement.¹⁵⁷ Through the notice-and-match and

repayment terms up to and including five years; the five-year government bond rate for repayment terms greater than five years and up to eight-and-a-half-years; and the seven-year government bond rates for repayment terms longer than eight-and-a-half-years. Rates are adjusted on a monthly basis. *See also* Levit, *supra* note 82, at 101-02 (discussing steps the Participants Group took in arriving at the CIRR). Interest rates are particularly relevant when ECAs engage in direct lending. When ECAs offer a guarantee or insurance, the banks set the interest rate, which usually is linked to the London Interbank Offered Rate (LIBOR) or some other internationally accepted floating rate.

152. ECAs, while government agencies, are not aid agencies (at least in the provision of export credits) and usually operate under domestic mandates to remain operationally self-sufficient. *See supra* note 131. Like any bank or insurance company, therefore, they charge fees or premiums for their services. The Arrangement’s latest regulatory effort was to standardize and minimize these premiums. The Arrangement, *supra* note 134, arts. 22-28, at 13-18; *see also The Knaepen Package: Guiding Principles for Setting Premia Fees Under the Arrangement on Guidelines for Officially Supported Export Credits*, at <http://www.oecd.org/dataoecd/59/4/1910218.pdf>. The Knaepen Package is a technical and rather complicated minimum premium benchmark system that attempts to link minimum premiums to market risk, while simultaneously adjusting premiums to compensate for disparate export credit systems and products. For detailed treatment of the Knaepen Package and the Arrangement’s institutionalizing of minimum premium benchmarks, *see* Levit, *supra* note 82, at 80-81, 103.

153. *Id.* at 109-11.

154. *Id.* at 110 n.200. Participants must also report all long-term transactions. The Arrangement, *supra* note 134, art. 44(a)(1), at 26.

155. The Arrangement, *supra* note 134, art. 41, at 25. While the Berne Union has a similar matching process, it is rudimentary in comparison. It does not apply to all deviations and is much less elaborate in terms of the notification and counter-notification requirements. *See supra* notes 112-115 and accompanying text.

156. If the match is identical, the Participant making the matching offer shall give all other Participants prompt notice of its intent to match. If the offer is not identical, the matching Participant must give other Participants prior notice of its intent to match and must provide them an opportunity to match its non-conforming offer in turn. The Arrangement, *supra* note 134, art. 41(b), at 25.

157. A common line is somewhat similar to a contract amendment. If the parties later realize that they did not include a provision to cover a particular contingency, or if they have a change of heart about a provision as originally negotiated, they may agree upon an amendment to the original contract as long as they comply with any particular amendment provisions laid out in the original. Similarly, the Participants agree to bend or manipulate the Arrangement for a particular issue or transaction through the acceptance of common line proposals. The Arrangement, *supra* note 134, art. 54, at 30.

The common line process is also used to interpret ambiguous provisions. For example, if a sales contract involves a country in category I (which allows 8.5-year repayment terms) and a country in

common line processes, the Arrangement permits the flexibility necessary to sustain consonance with ECA and exporter practice.

5. *Legal Status of the Arrangement*

The Arrangement is a "Gentlemen's Agreement" among the Participants.¹⁵⁸ It is not a formal treaty and, as such, it has developed over the years without the need for formal signature, ratification, and amendment processes. While the Arrangement benefits from OECD administrative support (and its text can be found on the OECD's website), it is not an official OECD act.¹⁵⁹ The Participants own the Arrangement, and the Participants Group is technically free-floating. Nonetheless, the Participants frequently liaison with the Working Party on Export Credits and Credit Guarantees (Export Credit Group, or ECG) of the OECD Trade Directorate, and the

category II (which allows ten-year repayment terms), Participants may use the common line procedures to determine the appropriate repayment term. *Id.* arts. 10 & 11, at 9-10. Another example involves interest rates. If a Participant wants to provide financing in the currency of a non-Participant, there is no CIRRR for the transaction, *see supra* note 151; in this case, the Participants may use the common line process to determine the appropriate CIRRR. The Arrangement, *supra* note 134, art. 19, at 12-13.

The OECD Secretariat makes available to Participants a current electronic listing of the status of all common lines, as well as all notifications received under any Arrangement notification obligation, including the notice-and-match provisions. *Id.* art. 58, at 31 (OECD maintains the status listing on the OECD's electronic bulletin board, called the Online Information System (OLIS)).

Participants must follow an elaborate process in arriving at common lines. *Id.* arts. 54-59, at 30-32. A Participant sends a proposal for a common line to the OECD Secretariat; the proposal must include a reference number, the names of the importing country and buyer, a project description, terms and conditions (as proposed by the initiating Participant), the nationalities and names of competing bidders, the bid closing date, the common line proposal, and any supporting analysis for the common line proposal. *Id.* art. 54, at 30. The common line proposals are then posted on OLIS. *Id.* art. 58, at 31. Participants must respond within twenty days with a request for more information, an acceptance, a rejection, or a proposal for common line modification. A Participant with no position on a common line is deemed to have accepted it. *Id.* art. 55, at 30-31. After the lapse of the twenty-day period, if not all Participants have accepted the common line but none have rejected it, the proposal shall be left open for eight more days. *Id.* art. 56, at 31. Any Participant that does not explicitly reject the common line proposal during this additional eight-day period is deemed to have accepted it, unless any Participant conditions acceptance on explicit acceptance by other Participants. *Id.* art. 56(b), at 31. A Participant may reject one or more elements of a common line, and other Participants, including the initiating Participant, may then decide whether to accept the common line as modified. *Id.* art. 56(c), at 31. The period can be extended by mutual consent once Participants agree on a common line or when the twenty-day and eight-day periods have run and it becomes clear that Participants will not be able to agree on a common line. *Id.* art. 57. The Secretariat of the OECD will notify Participants of the status of the common line proposal. *Id.* arts. 58-59, at 31. Accepted common lines will become effective three days after such notification. *Id.* art. 58, at 31.

158. The Arrangement, *supra* note 134, art. 2, at 7 ("The Arrangement is a Gentlemen's Agreement among the Participants").

159. *See id.* art. 2, at 7 ("The Arrangement, developed within the OECD framework, initially came into effect in April 1978 and is of indefinite duration. . . . it is not an OECD Act, although it receives the administrative support of the OECD Secretariat"); John E. Ray, *The OECD Arrangement and Other Export Credit Arrangements*, in *MANAGING OFFICIAL EXPORT CREDITS*, *supra* note 135, at 33, 42 ("[The Arrangement] is obviously 'in' the OECD, and yet it has never been officially part 'of' the OECD. Thus, although the Secretariat of the Organization provides a small staff and services and although the Arrangement is widely known as the 'OECD Arrangement,' it does not exist officially within the OECD. . . . It is not an 'act of the Organization.'"); *see also* OECD, *The Participants to the Export Credit Arrangement*, available at http://www.oecd.org/document/29/0,2340,en_2649_34169_1844765_1_1_1_1,00.html (all Participants are members of the OECD; while the Participants do not report to the OECD Council, the Council provides funding for the maintenance and development of the Arrangement; furthermore, the Participants report to OECD Ministers for instructions and guidance).

President of the Participants Group often chairs the ECG.¹⁶⁰ Moreover, in spite of, or perhaps because of, the Arrangement's legal and institutional informality, the Participants overwhelmingly abide by the Arrangement's rules. They have done so ever since the Arrangement's inception.¹⁶¹

What is the Arrangement's international legal status? Some prefer not to answer this question because they find the ambiguity surrounding the answer to be quite useful.¹⁶² Others label the Arrangement soft law,¹⁶³ terminology that does little to clarify its status but, at least for some international legal scholars, gives the Arrangement some status on the international law hierarchy.¹⁶⁴ Still others might consider the Arrangement a type of social norm among ECAs,¹⁶⁵ or even a codification of ECA customary practice.¹⁶⁶ Notwithstanding all these potential classifications of the Arrangement, what is patently clear is that over time, the Arrangement has assumed a harder, law-like stature and, in some cases, has been elevated to the realm of real law.

While the Arrangement has remained soft in terms of its entry, exit, and amendment procedures—in fact, the text itself unyieldingly insists on its non-binding status¹⁶⁷—the Arrangement's substantive and procedural rules have

160. See OECD, Export Credits, at http://www.oecd.org/departement/0,2688,-en_2649_34169_1_1_1_1_1,00.html (last visited Dec. 12, 2004).

161. See Levit, *supra* note 82, at 90-94, 148-51 (examining the Participants' export credit programs, creating a compliance index to measure each ECA's compliance with the Arrangement, and concluding that the current level of compliance measures 3.4 on a 4.0 scale). *Id.* at 93-94, 125-26, 154 (concluding that compliance has been more or less consistent throughout the Arrangement's history and finding a compliance index hovering around 3.7-3.8 on a 4-point scale through examination of G7 Participants' export credit programs since the Arrangement's inception, and through calculation of compliance indices for each Participant at different moments in the Arrangement's history). See also *id.* at 114-18 (exploring why compliance with the Arrangement is so pervasive and has been so consistent over time, and examining the paradoxically positive role that the Arrangement's soft, non-binding form may have played in facilitating compliance).

162. See OECD, The Participants to the Export Credit Arrangement, *supra* note 159 ("The status of the Arrangement has always been one of 'useful ambiguity.'"). See also Jacques de Lajugie, *Soft Law, Hard Results*, in OECD, THE EXPORT CREDIT ARRANGEMENT: ACHIEVEMENTS AND CHALLENGES, *supra* note 85, at 107 ("[F]ew people are aware of the actual status of the Arrangement which in itself is somewhat of a legal curiosity"); John E. Ray, *The Arrangement From the Inside*, in *id.*, at 33 ("From its conception, the export credit Arrangement has kept a low profile and sought to deal with real problems as they came up. Indeed, its very title—the 'Arrangement'—was carefully chosen to avoid any implication of a formal agreement, to say nothing of treaty. No one really seems to be sure exactly what 'arrangement' signifies in international jurisprudence. The Participants of the Arrangement have been careful to keep it that way.").

163. De Lajugie, *Soft Law, Hard Results*, *supra* note 162, at 107 ("[T]he Arrangement is one of the very few lasting and effective examples of 'soft law.'"). Soft law is not a precise legal term, although most scholars would at least agree that soft law is not legally binding. See *supra* note 3 and accompanying text.

164. See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1880 (2002) (stating that although soft law agreements are international law, these agreements "are made with an understanding that they represent a level of commitment that falls below that of a treaty. The violation of such an agreement, therefore, carries a less severe reputational penalty than does violation of a treaty."); see also Levit, *supra* note 82, at 130-31 (discussing Guzman's neo-institutional approach).

165. See *infra* notes 235-249 and accompanying text (discussing social norm literature).

166. But see *infra* notes 201-217 and accompanying text (arguing that customary international law is rarely specific or technical).

167. Some scholars who examine soft law discuss its hybrid forms, including the encasing of hard, technical commitments (e.g., CIRR, minimum premiums, starting point) in a soft form (a gentlemen's agreement). See Dinah Shelton, *Introduction: Law, Non-Law and the Problem of "Soft Law,"* in COMMITMENT AND COMPLIANCE, *supra* note 3, at 10-13 (arguing that "the line between law and not-law may appear blurred"); Chinkin, *Normative Development in the International Legal System*,

become increasingly specific and technical. The text now looks more and more like a formal agreement among states. Indeed, the Participants recently removed the word “Guidelines” from the formal title of the Arrangement, a move that reflects more than a semantic opportunity to fix an awkward title. Likewise, it is not by the mere whim of a web master that the Arrangement has assumed the appearance of a formal OECD act: it now bears an OECD number, with a cover page adorned with the OECD logo and the OECD Trade Directorate’s name, placing the Arrangement squarely within the OECD rubric.¹⁶⁸ These shifts have sent deliberate signals that the Participants view the Arrangement as more than a mere set of guidelines. While international law may not have innovated an appropriately descriptive term for the Arrangement’s status, from the Participants’ perspective, it is approaching something they might consider “international law.”

More significantly, in serving as a safe harbor for the WTO’s Agreement on Subsidies and Countervailing Measures (Agreement on Subsidies), a treaty that is unambiguously a formal piece of international law, the Arrangement has ascended in the international legal hierarchy.¹⁶⁹ The WTO text generally prohibits export subsidies conditioned on export performance (i.e., ECA subsidies to promote exports),¹⁷⁰ but it permits ECA support of domestic exports in instances where:

a [WTO member state] is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties . . . (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, [then] an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.¹⁷¹

By providing a way for governments to subsidize exports without violating the rules of the Agreement on Subsidies, the Arrangement has become a de facto part of the WTO treaty regime. In fact, in a recent WTO dispute between Canada and Brazil over Brazil’s financing of regional aircraft, the WTO reiterated that the Arrangement’s rules effectively govern questions about the legality of export credits.¹⁷²

supra note 3, at 31-34 (discussing the “hardening” of soft law instruments through use of specific normative mandates and transformative procedures).

168. The Arrangement, *supra* note 134.

169. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, ann. I(k), Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31 (1994), available at http://www.wto.org/english/docs_e/legal_e/24-scm.pdf [hereinafter Agreement on Subsidies].

170. *Id.* art. 3.

171. *Id.* ann. I(k). In particular, if a WTO member state’s support of its companies’ exports comports with the Arrangement’s CIRR and minimum premium benchmark rules, then that member state is determined not to have run afoul of the Agreement on Subsidies. *Id.* ann. I(j) (Arrangement’s minimum premium scheme) & ann. I(k) (Arrangement’s interest rate regime). See also Levit, *supra* note 82, at 120-21 (describing the mechanism by which the Agreement on Subsidies incorporates the Arrangement’s rules).

172. The dispute involved Brazil’s official export credit program for its regional aircraft, with Canada alleging that Brazil’s official interest rate support (i.e., subsidies) violated the Agreement on Subsidies. The WTO panel ruled that any ECA, whether a Participant ECA or a non-Participant ECA, that provides interest rate support, direct loans (fixed interest rates), or refinancing will not violate the Agreement on Subsidies if it applies the Arrangement’s interest rate rules (i.e., the CIRRs). See *supra*

In addition, some Participants' countries have incorporated the Arrangement into domestic law. It is now binding law in all EU member states, including the enlargement countries.¹⁷³ Although the United States has not incorporated the Arrangement in its entirety, the U.S. Congress has drawn upon much of the Arrangement's substance and spirit in legislation related to the Export-Import Bank of the United States.¹⁷⁴

It is worth pausing here to emphasize that the Arrangement at once incorporated many of the Berne Union's substantive rules and generally mimicked the General Understanding's processes and structure. The Arrangement borrowed the Berne Union's starting point definitions almost verbatim.¹⁷⁵ As such, the Arrangement appropriated the Berne Union's practice-based divvying of the international trade market into certain categories, each of which has a highly particularized point at which the transaction repayment clock starts ticking. In addition, the Berne Union's notification process also appears to have provided a skeletal structure for the Arrangement's notification and notice-and-match processes. In that sense, the Berne Union became a type of incubator for the Arrangement. In any case, to

note 171 and accompanying text. Effectively, the WTO imported the Arrangement's technical CIRR regime into the Agreement on Subsidies and thereby elevated many of the Arrangement's rules to a legal status commensurate with the Agreement on Subsidies, i.e., formal international law. WTO Dispute Panel Report on Brazil Export Financing Programme for Aircraft, WT/DS46/R, para. 7.31, http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm (noting the safe harbor in the Agreement on Subsidies, *see supra* note 169, and acknowledging that "Chapter I:2 of the OECD Arrangement, titled 'Scope of Application', provides that the Arrangement 'shall apply to all official support . . . regardless of whether the official support is given by means of direct credit/financing, refinancing, interest rate support, guarantee or insurance.' Accordingly, a developing country Member could under [Annex I(k) of the Agreement on Subsidies] provide interest rate support to reduce the interest rates on export credits to the levels allowed by the OECD Arrangement.").

173. The European Community began to incorporate the Arrangement into Community law prior to the establishment of the EU, and the European Council has now made the Arrangement directly binding and applicable to all member states. Council of Ministers Decision 2001/76/EC, 2001 O.J. (L 32) 1. For a discussion of the legal standing of a Council of Ministers decision, *see* DAVID MEDHURST, A BRIEF AND PRACTICAL GUIDE TO EU LAW 31 (2001); KLAUS-DIETER BORCHARDT, THE ABC OF COMMUNITY LAW 69 (1999).

174. The Export-Import Bank Act, 12 U.S.C. § 635 (2003), codifies some of the Arrangement, either by borrowing direct language or by referencing part of the Arrangement. For example, Ex-Im Bank may insure or guarantee only 85% of the total contract value of a medium-term export. This figure is, of course, an Arrangement-imposed limit. The Arrangement, *supra* note 134, art. 9(c), at 9. In addition, Ex-Im Bank will offer direct loans only at interest rates that are "consistent with international agreements." 12 U.S.C. § 635(b)(1)(B) (2003). While the Export-Import Bank Act does not explicitly reference the Arrangement, Congress only added the requirement of consistency "with international agreements" to the Act after the Arrangement came into effect. *See* Export-Import Bank Act Amendments of 1983, Pub. L. No. 98-181, § 2(b)(1)(B), 97 Stat. 1254, 1255 (1983). Interestingly, in the recent Export-Import Bank Reauthorization Act, Congress explicitly permitted the Bank to deviate from the Arrangement in the face of deviant foreign behavior, suggesting that Congress understands that Ex-Im Bank is otherwise bound by the Arrangement's terms. Export-Import Bank Reauthorization Act, 12 U.S.C. § 635i-9(b) (2003) ("[T]he Bank may provide financing on terms and conditions that are inconsistent with those permitted under the OECD Export Credit Arrangement to match financing terms and conditions that are being offered by market windows on terms that are inconsistent with those permitted under the OECD Export Credit Arrangement."). For a discussion of the legislative history of various Ex-Im Bank acts that evince a strong commitment to the Arrangement's substance and spirit, *see* Levit, *supra* note 82, at 124 n.293.

175. In June 2004, the Participants released a new version of the Arrangement. The previous version stated that the term "starting point of credit" is based on the Berne Union definition. *See* Levit, *supra* note 82, at 79 n.64 (citing the 1998 version of the Arrangement). These starting point definitions are now included in Annex XI of the Arrangement. The Arrangement, *supra* note 134, Annex XI, at 80 (definition of "starting point").

the extent that the Arrangement borrows from the Berne Union rules, the legal status of the two documents is indirectly linked. The Arrangement's development into a much "harder" law than the ambiguous "Gentlemen's Agreement" label initially connotes thus lends support to the similar evolution of the Berne Union rules discussed previously.

D. *The Anatomy of Bottom-Up International Lawmaking*

At first glance, the rules that form the core of this Article's analysis—the UCP 500, the General Understanding, and the Arrangement—are unlikely bedfellows, distinct in their substantive, transactional, and regulatory focus. The UCP 500 is the work of private, money-center banks, designed to create a common regulatory language that ensures the predictability, consistency, and equity necessary for letters of credit to facilitate a considerable volume of short-term international trade. The General Understanding arose under the auspices of the Berne Union, a nongovernmental institution where public and private export credit insurers pooled their resources and practical experiences, ultimately codifying rules based not only on their practice, but also on a shared objective of promoting international trade. The Arrangement is the creation of specialized government technocrats who developed a comprehensive set of rules that define how and to what extent governments may provide subsidized financing to further their exporters' trading efforts. In the end, the Arrangement eliminated a great deal of competition among these government ECAs in the name of sharpening competition among exporters.

Despite their diverse histories and objectives, these lawmaking examples march to a common rhythm. All three sets of rules are rooted in the informal, day-to-day experiences of trade finance practitioners. The route that these international lawmaking processes follow is often rather improvisational, as opposed to the tightly choreographed work of state elites. Yet they become something that is indisputably law—in this case, law that manages more than a trillion dollars worth of international trade—that is just as authentic and potent as the law that the more familiar treaty-making processes produce.

1. *The Lawmakers*

The starting point in these bottom-up lawmaking processes is a homogeneous group whose members are generally quite visible to one another, even if they are not well-known outside their lawmaking community.¹⁷⁶ Importantly, the group members are not necessarily state actors, and even those who work for the state (i.e., the Participants or the export credit insurers affiliated with ECAs) are making law in their capacity as practitioners rather than as legislators or diplomats.¹⁷⁷ In a sense, these

176. ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 177-78 (1991) (introducing the concept of "close-knit groups" in the context of social norms).

177. Much current international legal scholarship recognizes and celebrates the increasing importance of non-state actors in international norm creation. *See, e.g.*, Berman, *supra* note 7, at 323 (arguing that "non-state communities" assert significant "claims to jurisdictional authority" and "articulate norms"); *see also infra* Part III.A.2 (discussing the transnational legal process approach and the importance of transnational actors—as opposed to state actors—in the lawmaking process).

groups assume the look and feel of private clubs.¹⁷⁸ The Banking Commission (seventy-five members), the Berne Union (fifty-four export credit insurers), and the Participants Group (twenty-four Participants) are rather small and circumscribed collectivities. Group members see each other repeatedly, not merely in formal gatherings but also in meetings during the course of a transaction and in alternative trade finance fora, such as WTO, OECD, and IMF/World Bank meetings. There is a high degree of inter-group cross-fertilization, particularly because of the technical insularity of the world of international trade finance.

Moreover, while the groups are geographically diffuse (although heavily populated with members from OECD countries), their membership is more or less professionally homogeneous. Group members specifically identify themselves as bankers, insurers, or ECA bureaucrats, and they identify collectively as participants in a trade finance community. Group members share a general normative outlook—an acceptance of the fundamental liberal premise that international trade should occur on a free and fair playing field—that also gives them a general coincidence of interests. Finally, the technicalities of the trade finance business link group members in a common, arcane language that transcends nationality but is also relatively inaccessible to outsiders. This specialized language simply reinforces the insularity and club-like nature of the group itself.

Given that a close-knit, homogeneous group appears to provide the requisite foundation for bottom-up lawmaking, there may be endemic limitations to this lawmaking model.¹⁷⁹ For example, lawmaking communities in human rights or even international environmental law are much more diverse, joining multiple constituencies—NGOs, indigenous communities, state officials, corporations, and intellectual elites, to name a few—with competing demands, interests, and identities but without a common trade and technical language to overcome diversity. In these circumstances, a more classic top-down approach may present the greatest promise for mediating differences and generating law.

2. *Substantive Norms*

The substantive rules that each group develops grow from the group members' practices. The UCP represents the Banking Commission's periodic collection and codification of international banking practice designed to enable "business people in countries with differing legal systems to apply

178. Others have noted that the more high-profile, formal international trade institutions—such as the WTO, the World Bank, and the IMF—resemble clubs and have built a "club model" of cooperation, which will be discussed further. *See infra* Part IV.A.1. *See generally* Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in *EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM* 264 (Roger B. Porter et al. eds., 2001).

179. The author recognizes that it is difficult to build a model from three examples in the area of trade finance. Nonetheless, the bottom-up lawmaking phenomenon can be seen in other areas of international regulation as well. *See infra* note 197.

their own practical mechanisms for the conduct of trade.”¹⁸⁰ The Berne Union, explicitly charged with furthering sound principles and practices in the export credit industry, serves as a conduit for sharing experiences and underwriting information.¹⁸¹ The Berne Union then translates this information into rules and standards that echo not only general industry norms but also specific practices with respect to individual business sectors.¹⁸² The Participants codified some standard official export practices in the Arrangement, particularly those related to repayment terms, installment payments, minimum down payments, and a starting point (an export credit practice that the Berne Union members had already codified) under the mantra of respecting practices that “traditionally apply to certain trade or industrial sectors.”¹⁸³ In all of these examples, practice determines the rules which in turn govern those who practice.

Particularly in the case of the Participants Group, and to a lesser extent the Berne Union, some of the substantive rules impose discipline or restraint on members’ activities. In these cases, the substantive rules set standards rather than reflect existing practices. Nonetheless, because of conservative decision-making processes, especially the Participants’ requirement of absolute consensus prior to adopting any rule,¹⁸⁴ even forward-looking rules maintain strong ties to practical ECA experience and tolerance for change. Furthermore, to conceive of practice-oriented rules solely as the rote echoing of existing or past practice is to ignore evolutionary development and the synergistic innovation of practitioners grappling with common problems.¹⁸⁵

In all cases, the substantive rules are technical, not general, drawing necessarily on the expertise of the group and further anchoring the rules in the group’s practices. Obviously, rules rooted in practice must be adaptable and flexible, or otherwise the substantive rules may fall out of sync with evolving norms. In each example, the group reviews the rules periodically to ensure that they continually reflect practice. The Banking Commission publishes a

180. UCP 500, *supra* note 15, at 3.

181. For instance, the Berne Union requires that all members deposit with it annual reports and other information regarding members’ export credit insurance schemes. General Understanding, *supra* note 87, art. XI(a)(i) & (ii), at 21-22.

182. For instance, the manner in which the Berne Union General Understanding divides the exporting universe into seven categories, each with different attributes and different repayment tenors, reflects prevailing export credit insurance practices. See *supra* note 94 and accompanying text. Additionally, each individual sector agreement reflects the on-the-ground particularities of the relevant export industry. See *supra* note 98 and accompanying text.

The Secretary-General states repeatedly that the Berne Union is an organization rooted in the practical, “daily activities” and “technical expertise” of members. Kathleen Williams, *The Interview: Kimberly Wiehl*, TRADE & FORFEITING REV., Jan. 9, 2004, <http://www.tfreview.com/xq/asp/-sid.C8AD95E0-9825-46C6-96A3-A8A4CE94F487/articleid.43C17877-7608-41CF-90F1-5D858B105407/qx/display.htm>; see also Secretary-General Wiehl Interview, *supra* note 78 (emphasizing that the Berne Union is a practice-based rather than a policymaking institution); Berne Union Press Release, *supra* note 107 (referencing Berne Union’s role as a conduit of information on industry practice, whereby it concomitantly contributes to the acceptance and adoption of such practices throughout the industry).

183. The Arrangement, *supra* note 134, at 9.

184. See *supra* note 141 and accompanying text.

185. The Banking Commission, which is perhaps the most perfect example of merely codifying existing practice, nonetheless views its mission not only in terms of solidifying existing practice, but also in a more forward-looking vein, in terms of facilitating and standardizing developing practice. UCP 500, *supra* note 15, at 4.

version of the UCP approximately once a decade, but in the interim reviews rules through its opinion-writing role. The Berne Union and the OECD, on behalf of the Participants Group, collect information and require periodic reporting as a way to check the practices of members against the rules.¹⁸⁶ Finally, the Arrangement's notice-and-match process, as well as the Berne Union's notice process, offers group members a legitimate way to deviate from the rules on a transaction-by-transaction basis, effectively accommodating specific practice demands in the face of discordant or out-of-date rules.¹⁸⁷

3. *Institutionalization*

In each lawmaking example, the group either created or appropriated an institutional home that codified and managed the substantive rules. The Participants Group is a free-standing institution, created exclusively to draft and, with the assistance of the OECD's ECG,¹⁸⁸ manage the Arrangement. The Berne Union, created in 1934 as a clearinghouse for underwriting information, maintains the General Understanding. The Banking Commission drafts and disseminates the UCP 500. The Banking Commission is embedded in the ICC, a private institution that mimics, in some ways, the hierarchical structure of many intergovernmental institutions.

From the lawmaking group's perspective, these institutions create the critical centrifugal force for a transnational and geographically diffuse lawmaking group. The institutions facilitate information exchange, communication, and collaboration among group members. In the case of certain Arrangement and Berne Union discipline-setting rules, the institutions have also helped overcome the cooperation and collective action problems that could have undermined efforts at a concerted multilateral reduction of export subsidies.¹⁸⁹ Institutionalists and regime theorists importantly contemplate questions of institutional combustion and design, although a thorough exploration of their work falls outside of the scope of this Article.¹⁹⁰

186. See Levit, *supra* note 82, at 109-11 (on information-gathering and the Arrangement); see also *supra* notes 100-105 and accompanying text (Berne Union information-gathering rules).

187. See Levit, *supra* note 82, at 128.

188. See *supra* note 160 and accompanying text.

189. For a game theory analysis and critique of the Arrangement's reduction in export credit subsidies (particularly interest rate subsidies), see Levit, *supra* note 82, at 95-100.

190. See generally *id.* at 95-100 (examining the institutional design of the Arrangement). Institutionalists and regime theorists employ economic and game theoretic analysis to provide insight into the combusive or catalytic moments that give rise to a common, institution-building enterprise. See generally Duncan Snidal, *Political Economy and International Institutions*, 16 INT'L REV. L. & ECON. 121 (1996); Robert O. Keohane & Lisa L. Martin, *The Promise of Institutional Theory*, 20 INT'L SEC. 39 (1995) ("[L]ike realism, institutionalist theory is utilitarian and rationalistic"); Friedrich Kratochwil & John Gerard Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT'L ORG. 753 (1986); Duncan Snidal, *The Game Theory of International Politics*, 38 WORLD POL. 25 (1985). Many regime theorists have evolved into institutionalists or have been labeled as such from time to time. See Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1948 (2002) (arguing that modern literature uses the terms "regime" and "institution" interchangeably).

For prominent examples of regime theory, see generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); ROBERT O. KEOHANE, *AFTER HEGEMONY* (1984); *THE ANATOMIES OF INTERDEPENDENCE* (John Gerald Ruggie ed., 1983); ORAN R. YOUNG, *COMPLIANCE AND PUBLIC AUTHORITY: A THEORY WITH INTERNATIONAL APPLICATIONS* 331 (1979) (illuminating the "fundamental

The institutions that support these international lawmaking processes also pave the way for their ultimate formalization. Some of these institutions, such as the OECD's ECG and to a certain extent the ICC, are familiar and comfortable with the language and trappings of formal law. Their proximity to formal lawmaking tends to drag the processes inexorably in the direction of greater formality. Furthermore, these institutions may ignite some self-destructive tendencies. Institutionalization adds inertia to the substantive rules, increasing the risk that they will fall out of step with practice. Also, the institutions themselves may become impenetrable fortresses; Part IV further explores how growing opacity may trigger destabilizing claims from outsiders. Finally, the institutions may assume an identity or mission of their own, independent of their members' practices. In some cases, this may be a desired end. From the perspective of bottom-up lawmaking, however, it is worth noting that institutions designed to aid in the normalization of practice may assume a standard-setting posture that is so out of sync with practice as to alienate group members and possibly lead to the disintegration of the group.

4. *A Closed Legal System: Procedural, Interpretive, and Remedial Norms*¹⁹¹

A self-sufficient and self-executing legal system includes not only substantive rules but also the processes necessary to interpret them—allowing the rules to maintain a practical, self-correcting course. The ICC Banking Commission offers the most developed example of such interpretive capacity. When banks or other parties to a letter-of-credit transaction have a question about the meaning or scope of the UCP 500, the Banking Commission assumes an interpretive, quasi-judicial posture, issuing opinions and policy statements. In fact, with the recent introduction of DOCDEX, the Banking Commission has even forayed from the role of advisor to that of adjudicator, resolving the disputes that may arise when the rules are put into practice.

The drafters of the Arrangement and Berne Union frameworks did not create courts or adjudicatory bodies. Nonetheless, the lawmakers created procedural and remedial norms to maintain the system's self-sufficiency. Disputes over substantive Berne Union or Arrangement rules involve one group member, either ECA or export credit insurer, that has offered export credit on terms more favorable than those permitted under either agreement. If the Berne Union or the Arrangement were a mere set of substantive rules, the disputing parties would have to look outside the agreement for resolution,

character" of regimes); Robert Jervis, *Security Regimes*, 36 INT'L ORG. 357 (1982) (describing conditions in which security regimes or cooperative security arrangements will come into existence); Robert O. Keohane, *The Demand for International Regimes*, 36 INT'L ORG. 325 (1982); Stephen D. Krasner, *Regimes and the Limits of Realism: Regimes as Autonomous Variables*, 36 INT'L ORG. 497 (1982); Charles Lipson, *The Transformation of Trade: The Sources and Effects of Regime Change*, 36 INT'L ORG. 417 (1982); Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT'L ORG. 299 (1982); see also Stephan Haggard & Beth A. Simmons, *Theories of International Regimes*, 41 INT'L ORG. 491 (1987); Oran R. Young, *International Regimes: Toward a New Theory of Institutions*, 39 WORLD POL. 104 (1986) (reviewing KEOHANE, *AFTER HEGEMONY*, *supra*, INTERNATIONAL REGIMES, *supra* note 83, and THE ANATOMIES OF INTERDEPENDENCE, *supra*).

191. This Article borrows the taxonomy of substantive, procedural, remedial, and interpretive norms from ELLICKSON, *ORDER WITHOUT LAW*, *supra* note 176, at 132-36.

possibly to an arbitral tribunal or even a local or international court. Fortunately, these agreements offer a set of notice-and-match rules that effectively mediate and deflate potential disputes among members by permitting deviations as long as other members are notified and offered similar opportunities. In a sense, this notice-and-match process is an alternative, innovative way of resolving—or perhaps averting—disputes. It simultaneously accommodates the export credit industry's desire to maintain some underwriting flexibility and the demands of an ultra-competitive trade environment. Similarly, Participants collectively confront and interpret the ambiguities in the text through the Arrangement's common line process.

While procedural and remedial norms effectively complete the legal system and assure self-sufficiency, each legal system is also self-executing. A self-executing system is one in which those who make the substantive law also interpret and enforce the substantive law. The members of the Banking Commission who issue opinions and mediate cases are essentially the same bankers and academic experts who drafted the UCP, and they will choose the experts on the DOCDEX panels whose decisions they then ratify. The Participants or Berne Union members themselves neutralize transaction-specific disputes by offering others legitimate opportunities to engage in the same deviant behavior. It is the Participants who, by consensus, arrive at common lines to assist in interpreting the text. In groups such as the Berne Union and the Participants Group, where the threat of diminished reputational standing serves to maintain compliance, fellow members or Participants lend credence to such a threat. Interpretation and enforcement occurs in tune with the practices and preferences of the group members due to their multiple roles in the legal system: they are not only the authors and subjects of the rules but also the arbiters of disputes and enforcers of those rules.

5. *From Soft to Hard Law*

One of the common features of all of these lawmaking processes is that their respective rules, even when initially codified, fall short of hard international law. The Arrangement is explicitly a "Gentlemen's Agreement."¹⁹² By its terms and by the mutual understanding of the Participants, it is not law. The Berne Union's General Understanding is a set of "understandings and agreements" that members have "summarized and consolidated" for their convenience, rather than a binding legal commitment.¹⁹³ Finally, the UCP 500 is a set of guidelines derived from and consistent with bank practice, drafted by private parties who happen to be members of the ICC; it is not binding international law, for it does not fit into the technical international law categories.¹⁹⁴ For lack of a better term, scholars have lumped these bodies of rules into the catch-all category of soft law.¹⁹⁵

Yet over the course of these bottom-up lawmaking exercises, soft instruments frequently hardened into some type of law, either international

192. See *supra* note 158.

193. General Understanding, *supra* note 87, art. I(i), at 1.

194. See *supra* note 2 and accompanying text.

195. See *supra* note 3 and accompanying text.

law (i.e., a treaty or international agreement) or domestic law (generally a statute or judicial rule of decision).¹⁹⁶ The Arrangement, born as the mere practices and collaborative desires of ECAs, developed into a rather soft but technical gentlemen's agreement and is now de facto hard international law through its incorporation into the WTO regime. In many countries, principally EU member states and the United States, the Arrangement has been incorporated in whole or in part into domestic legal systems. For its part, the Berne Union General Understanding started as an effort to pool expertise in the field of export credit insurance. It then evolved into a technical set of soft rules that were appropriated by instruments such as the Arrangement. Now effectively binding law, the Arrangement has provided the back door through which the Berne Union rules have also ascended to law. Finally, the ICC, on behalf of international business and banking interests, drafted the UCP as a practical guide to resolve letter of credit questions; now judges in the United States and elsewhere apply the UCP 500 and even Banking Commission decisions as a type of transnational commercial code to resolve letter of credit disputes.

This Article's bottom-up international lawmaking stories tell of trade finance practitioners—private individuals and government technocrats—coalescing, often within some institutional structure, to interpret practice-based norms and solidify their interpretations into a system of self-governance. In the process, these norms percolate from the informal to become formal law. This improvisational, practice-driven route to formal law stands in stark contrast to the familiar top-down, treaty-based story, with state diplomats and policymakers who are often quite removed from on-the-ground practice proclaiming the law. Bottom-up international lawmaking does not replace or supplant traditional top-down accounts; within the international legal system, they operate side-by-side. Yet because international legal scholars have largely overlooked bottom-up lawmaking in favor of more traditional stories, bottom-up lawmaking has not yet played a significant role in international legal theory. Part III contemplates how bottom-up international lawmaking bears on theories of international law and lawmaking.

III. BOTTOM-UP INTERNATIONAL LAWMAKING: CHALLENGES TO THE PREVAILING INTERNATIONAL LEGAL FRAMEWORKS

A. *International Lawmaking Theory*

This Article tells three transnational lawmaking stories. Yet similar stories have unfolded beyond the relatively narrow realm of international trade finance.¹⁹⁷ While analytical jurisprudence has long discussed the nature of

196. Others have noted this phenomenon of formal legal regimes appropriating informal norms. See Berman, *supra* note 7, at 322 (noting that "alternative norms" are "often incorporated into more 'official' legal regimes"); see also Chinkin, *supra* note 3, at 31-34 (describing the phenomenon of soft norms becoming hard law and noting the dynamic as a way in which non-state actors influence the international lawmaking process).

197. While the discussion of such additional examples is beyond the scope of this Article, the bottom-up lawmaking phenomenon is not relegated to the three trade finance lawmaking trajectories

developed in this Article, and international legal scholarship would benefit from in-depth analyses of the instances of international lawmaking discussed below.

Within the broader international trade world, the law governing both international bills of lading and international commercial terms (INCOTERMS) evolved through a bottom-up lawmaking process. Consider bills of lading. The legal issue that dominates the relationship between the carrier (shipping company) and the shipper (exporter) is the extent to which the carrier bears liability for losses that occur in transit. At the turn of the twentieth century, an oligopolistic shipping community attempted to exonerate itself from any liability for losses at sea, even those losses occurring through gross negligence, through broad contractual exemptions. See Saul Sorkin, *Changing Concepts of Liability*, 17 FORUM 710, 712 (1982); Note, *Forum Selection in Maritime Bills of Lading Under COGSA*, 12 FORDHAM INT'L L.J. 459, 463-64 (1989). A community of practitioners—exporters (shippers), cargo carriers, bankers, and underwriters—joined at the World Shipping Conference in 1920 to examine some of the national responses to British bill-of-lading practices and discuss ways to create standard international bills of lading which would harmonize the form of the bill of lading as well as the allocation of liability among various parties to an international trade transaction. See Sorkin, *supra*, at 712. Two private trade organizations composed of trade-related practitioners, the International Law Association and the Comité Maritime International, continued working on the issue. See Comité Maritime International, *A Brief Structural History of the First Century*, available at <http://www.comitemaritime.org/histo/his.html> (last visited Dec. 12, 2004); see also *Forum Selection in Maritime Bills of Lading*, *supra* at 465-66. The practitioners ultimately codified the rules that limited the extent to which shipping companies could insulate themselves from liability, drawing on the experiences and practices of industry members, as well as domestic regulatory efforts, in the International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155 [hereinafter *International Bills of Lading Convention*]. These international conventional rules evolved over the years in response to practitioner experience, changes in the nature of international trade and transport, and at the behest of the Comité Maritime International. In addition, through ratification processes, states party incorporated the rules of the *International Bills of Lading Convention*, *supra*, into domestic legislation. See, e.g., *Carriage of Goods by Sea Act*, 46 U.S.C. §§ 1300-1315, 49 Stat. 1207 (1936). Practitioners retain a significant lawmaking role today, with practice-rooted experience and norms informing current efforts to harmonize and standardize bill-of-lading practices in a world of e-commerce and electronic transmission of data. Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission, as adopted by the ICC Executive Board at its 51st Session (Paris, Sept. 22, 1987), reprinted in Richard Brett Kelly, *The CMI Charts a Course on the Sea of Electronic Data Interchange: Rules for Electronic Bills of Lading*, 16 TUL. MAR. L.J. 349, 372 (1992).

INCOTERMS, see generally INCOTERMS 2000, *supra* note 24, are a type of shorthand code that allocates rights and responsibilities between buyers and sellers in an international sales transaction. Each of the thirteen INCOTERMS divides risks, responsibility for carriage of goods, and costs (including taxes and customs). For example, an INCOTERM of "FOB New York harbor" means that the seller bears all costs, risks, and transport responsibilities until the goods arrive in the port of New York for export; at that point, all costs, risks, and transport responsibilities shift to the buyer. See INCOTERMS 2000, *supra* note 24, at 48-55 (for each INCOTERM, dividing obligations between buyer and seller with regard to: (1) providing goods and paying for goods; (2) licenses, authorizations, and formalities; (3) contracts of carriage and insurance; (4) delivery; (5) transfer of risks; (6) division of costs; (7) notification; (8) proof of delivery, transport document, or equivalent electronic message; (9) inspection, packaging, marking; and (10) other obligations). In other words, each INCOTERM is a symbol for an otherwise complex web of contractual responsibilities that must be specifically delineated in a sales contract. These INCOTERMS do not come from an intergovernmental or governmental lawmaking body but rather from exporters and importers via the ICC's Commission on International Commercial Practice. *Id.* at 4. In this regard, as with the UCP, the ICC has assumed responsibility for interpreting the INCOTERMS, see JAN RAMBERG, ICC GUIDE TO INCOTERMS 2000: UNDERSTANDING AND PRACTICAL USE (1999), and for revising them when needed to "adapt them to contemporary commercial practice." See *id.* at 22. These INCOTERMS are now the international commercial standard. See Peter Thomas Muchlinski, *Globalisation and Legal Research*, 37 INT'L L. 221, 227 (2003); John Linarelli, *The Economics of Uniform Laws and Uniform Lawmaking*, 48 WAYNE L. REV. 1387, 1397 (2003). They have been effectively incorporated, by reference, into the United Nations Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, Annex I, art. 9(2), U.N. Doc. A/CONF.97/18 (1980), reprinted in 19 I.L.M. 668 (1980) [hereinafter CISG] ("The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."). Also, U.S. courts regularly defer to the INCOTERM that parties incorporate into their contract in order to resolve contractual disputes. See *BP Oil Intern., Ltd. v. Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333,

335 (5th Cir. 2003); *China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 264 F. Supp. 2d 1229, 1238 (Ct. Int'l Trade, Feb. 13, 2003); *St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH*, 2002 WL 465312, *2 (S.D.N.Y. 2002); *In re Daewoo Intern. (America) Corp.*, 2001 WL 1537687, *1 (S.D.N.Y. 2001); *Skandia Ins. Co., Ltd. v. Star Shipping AS*, 173 F. Supp. 2d 1228, 1233-34 (S.D. Ala. 2001). See also Clayton P. Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG*, 5 CHI. J. INT'L L. 157, 173-79 (2004).

Examples of bottom-up lawmaking abound outside the international trade world. The following is certainly far from an exhaustive accounting:

*The Society for Worldwide Financial Telecommunication (SWIFT) is an inter-bank, transnational cooperative designed to manage, regulate, and standardize the electronic transfer and settlement of funds among banks. See SWIFT History, <http://www.swift.com>. See also *infra* notes 302, 317, 332 (discussing SWIFT's relationship with the ICC Banking Commission); Luc Thevenoz, *Error and Fraud in Wholesale Funds Transfers: U.C.C. Article 4A and the UNCITRAL Harmonization Process*, 42 ALA. L. REV. 881 (1991).

*Multinational corporation-driven practices and codes of conduct became industry standards, see, e.g., Fair Labor Association, Workplace Code of Conduct, <http://www.fairlabor.org/all/code/index.html>, and they were the precursor, model, and impetus for international codification efforts. See, e.g., The Global Compact, at <http://www.unglobalcompact.org>. Domestic courts and agencies grapple with the issue of how to hold corporations to such voluntary codes of conduct, many of them transnational in scope. See, e.g., *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (discussing whether Nike had a First Amendment right to advertise its code of conduct infused with transnational standards in light of its violations of this code of conduct).

*Transnational safety standards derive from industry practice and are frequently codified in international agreements, treaties, and understandings. The International Organization for Standardization (ISO) is a nongovernmental organization comprised of safety standard-setting bodies and organizations from over 146 countries. Some members are affiliated with governments, others have roots in the private sector, and yet other members are industry associations. See International Organization for Standardization: Introduction, at <http://www.iso.org/iso/en/aboutiso/introduction/index.html>. ISO promulgates rules that are firmly rooted in industry practice and market experience. *Id.* ("ISO develops only those standards for which there is a market requirement. The work is carried out by experts on loan from the industrial, technical and business sectors which have asked for the standards, and which subsequently put them to use. These experts may be joined by others with relevant knowledge, such as representatives of government agencies, consumer organizations, academia and testing laboratories."). ISO then codifies these standards. See, e.g., *ISO 9000* (quality management), and *ISO 14000* (environmental management), at <http://www.iso.org/iso/en/iso9000-14000/index.html>. ISO interprets these standards through a body similar to the ICC Banking Commission. See International Organization for Standardization's Technical Committee 176: Interpretations Database, at <http://www.tc176.org/Interpre.asp>. These standards often are effectively incorporated into international agreements. See, e.g., Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND TABLE, 33 I.L.M. 81 (1994). There are other, more specialized standard-setting organizations that generate rules and thereby make law in a bottom-up fashion. See Lee A. Travis, *Corporate Governance and the Global Social Void*, 35 VAND. J. TRANSNAT'L L. 487, 508-09 (2002) (discussing transnational standard-setting organizations in the chemical industry and noting that their rules have been incorporated into United Nations instruments).

*International intellectual property law may be traced in great part to multinational practice; Susan K. Sell, *Structures, Agents and Institutions: Private Corporate Power and the Globalisation of Intellectual Property Rights*, in NON-STATE ACTORS AND AUTHORITY IN THE GLOBAL SYSTEM 92 (Richard A. Higgott et al. eds., 2000).

*Transnational networks of securities regulators, government practitioners rather than diplomats or policymakers, join under the auspices of the International Organization of Securities Commissions (IOSCO), which provides fertile opportunities for transnational cooperation and standardization in the securities industry. For general information on IOSCO, see <http://www.iosco.org>. IOSCO principles and rules are then codified in resolutions and memoranda of understanding, which are not international law under formal definitions but which often assume the force of law. See IOSCO Library of Public Documents, at <http://www.iosco.org/library/#>. Also, IOSCO standards are incorporated into domestic regulatory schemes and enforced in local court. See, e.g., SEC Commissioner Roel C. Campos, Speech at the U.S.-Europe Symposium: Program on International Financial Systems (Nov. 15, 2003), in 1428 PLI/CORP 41; Manning Gilbert Warren, III, *The Harmonization of European Securities Law*, 37 INT'L L. 211, 216 n.38 (2003). IOSCO, the Basel Committee on Banking Supervision, and the International Association of Insurance Supervisors are favorite examples for a group of scholars who argue for a

international law,¹⁹⁸ and a growing body of scholarship focuses on the effectiveness and potency of international law,¹⁹⁹ this Article contemplates solely international *lawmaking* scholarship—focusing on the process that leads to law rather than the nature of the law itself. Five decades ago, the New Haven School exhorted international practitioners and legal scholars to elevate lawmaking processes to analytical prominence.²⁰⁰ The three trade finance stories in this Article elucidate both the strengths and limitations of the lawmaking theories that international legal scholars have developed in response to this call.

1. *Beyond Customary International Law*

In a sense, international legal scholars stumbled upon bottom-up lawmaking long ago. Is customary international law (CIL) not just another way of describing bottom-up international lawmaking? In some ways, it is.

transgovernmental network approach to international law. *See infra* notes 224-231 and accompanying text.

*Private arbitral institutions such as the ICC, the London Court of International Arbitration, and the American Arbitration Association draft rules and procedures to govern international commercial arbitration. *See, e.g.*, INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION (Jan. 1, 1998), http://www.iccwbo.org/court/english/arbitration/pdf.documents/rules/rules_arb_english.pdf. These rules are rooted in arbitration experience and practice and are updated periodically to remain in tune with practice. *See* Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 101 n.113 (2000); *see also* STEVEN C. BENNETT, *ARBITRATION: ESSENTIAL CONCEPTS* (2002). The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention], implicitly endorses and internationalizes these procedures by requiring courts in states party to the Convention to recognize and enforce the arbitral decisions as well as the procedures that give rise to these decisions. For an example of domestic incorporation of the New York Convention, *see* Federal Arbitration Act, 9 U.S.C. § 201 (1970).

Most of these examples relate to international commerce and business where the interests of the practitioner lawmakers are generally coincident. *See generally* A. CLAIRE CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY* (2003) (arguing that much international law is a product of transnational corporate activity, including relatively standardized corporate relationships and their opting into private commercial arbitration); Virginia Haufler, *Private Sector International Regimes, in NON-STATE ACTORS AND AUTHORITY IN THE GLOBAL SYSTEM*, *supra* at 121 (discussing private groups of practitioners who codify rules that ultimately gain the authority that normally attaches to law). *See supra* note 179 and accompanying text (discussing areas of international law and regulation that may be less suited to bottom-up lawmaking).

198. *See, e.g.*, H. L. A. HART, *THE CONCEPT OF LAW* ch. X (1961).

199. *See, e.g.*, Hathaway, *supra* note 190.

200. *See* W. Michael Reisman, *International Lawmaking: A Process of Communication, The Harold D. Lasswell Memorial Lecture* (Apr. 24, 1981), *reprinted in* 75 AM. SOC'Y INT'L L. PROC. 101 (1981). The New Haven School links lawmaking to a communicative process of authoritative decision-making on a domestic level that strives to maintain a world public order of human dignity. *Id.* at 113 (describing the New Haven School as a "communications model" that sees the legal process as comprising three communicative streams of "policy content, authority signal and control intention." This communications model "liberates the inquirer from the . . . distorting model of positivism, which holds that law is made by the legislature," in favor of the notion that "any communication between elites and politically relevant groups which shapes wide expectations about appropriate future behavior must be considered as functional lawmaking"). *See generally* Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L.J. 991 (1995) (reviewing HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY* (1992)); Symposium, *McDougal's Jurisprudence: Utility, Influence, Controversy*, 79 AM. SOC'Y INT'L L. PROC. 266 (1985) (remarks of Oscar Schachter); Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967). For an excellent description of the New Haven School, *see* Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 209-11 (1993).

CIL is a pattern and practice of state behavior; bottom-up international lawmaking is also anchored in practices. CIL begins as a spontaneous, amorphous, and decentralized process.²⁰¹ Bottom-up lawmaking also begins with a type of messy spontaneity absent from formal treaty mechanisms. As such, both CIL and bottom-up lawmaking are inductive lawmaking processes. Furthermore, the means by which CIL has evolved in the post-World War II period, often moving from an unwritten and spontaneous understanding to a codified international agreement,²⁰² is generally reminiscent of bottom-up lawmaking examples. Just as a considerable amount of CIL is now embedded in formal international agreements, many informal trade finance norms have hardened into law through the bottom-up lawmaking process.

Yet the way scholars generally conceive of CIL does not quite capture what is happening in these lawmaking examples.²⁰³ First, classic CIL requires “a general and consistent practice of states followed by them from a sense of legal obligation [opinio juris].”²⁰⁴ In identifying CIL, scholars, practitioners, and judges scrutinize the official acts of states and state actors and induce CIL from a juridical amalgam of such acts.²⁰⁵ This focus on official or legal acts—

201. See ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 3-10 (1971) (offering a definition of CIL that demonstrates that the process of customary international lawmaking is diasporic, haphazard, and autonomous); see also IAN BROWNLIE, *PUBLIC INTERNATIONAL LAW* 6-12 (6th ed. 2004) (discussing “international custom”).

202. In modern CIL, a common instrument has been the codification treaty, whereby diplomats restate customary international norms in a treaty or international agreement. See W. Michael Reisman, *Treaties and Other Unperfected Acts in International Law: Constitutional Functions*, 35 VAND. J. TRANSNAT'L L. 729, 746 n.75 (2002). For an example of a codification treaty, see Vienna Convention on the Law of Treaties, *supra* note 1 (codifying rules governing the formation, interpretation, and termination of treaties); Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3, 18 (Feb. 2) (noting that Article 62 of the Vienna Convention is a codification of CIL). See also United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOS Convention]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277. Once a customary norm is codified in a treaty, states party are bound by the treaty and non-parties remain bound by the custom. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 2, § 102, reporter's note 5.

203. Perhaps CIL has become the stepchild of many legal scholars for the same reason that treaties and formal institutions have become their darling child; CIL detracts from scholarly attempts to fortify international law with the feel of “real law,” while treaties help that cause.

204. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 2, § 102(2) (emphasis added).

205. In identifying the practice of states, practitioners and scholars scrutinize “diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or taken in cooperation with other states, for example in organizations such as the [OECD].” *Id.* at cmt. b. The opinio juris element has been notoriously difficult to prove via direct evidence; for example, how does one know whether a state is acting out of a sense of legal obligation? Thus, scholars and practitioners rely on a close proxy for opinio juris—national statements of intent, often embodied in the very same official acts offered as proof to support the practice prong of CIL. See Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559, 568-69 (2002) (discussing the problems inherent in proving the opinio juris prong of CIL and citing the various scholars who have attempted (and arguably failed) to articulate a clear path to proving opinio juris); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 469-75 (2000) (arguing that the analytic means that scholars use to prove an opinio juris are “a mere fiction”). Thus, in proving CIL, scholars and judges often follow a two-for-one approach, using government proclamations (in the form of votes, diplomatic statements, or other forms of domestic law) as proof of both the opinio juris prong and the practice prong of the CIL inquiry. Consider, for example, how the Supreme Court identified CIL in the seminal U.S. case *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which effectively revived the Alien Tort Claims Act and, with it, reinvigorated U.S. courts' role in enforcing CIL norms. At issue in *Filartiga* was whether torture violates CIL. In deciding that it does, the Court pieced together several

treaties, non-binding resolutions and declarations from international institutions, national constitutions and laws, and diplomatic exchanges—often remains one step removed from actual on-the-ground practice. This distance between the objects of scholarly focus and actual state practice results in noticeable gaps between CIL norms and state behavior.²⁰⁶ While, admittedly, behavior does not always conform to law, this defect is particularly awkward for CIL given its existential link to practice.²⁰⁷

In contrast, this Article's bottom-up lawmaking examples do not dwell on the official acts, imprimaturs, or statements of high-level diplomats or policymakers; instead, bottom-up lawmaking shows how the on-the-ground practices of a myriad of *transnational* actors (private individuals, corporations, and highly specialized governmental technocrats) are

sources, most not legally binding but all the products of quintessential state actors, to constitute a norm of CIL. *Id.* at 881-85.

206. Some note that this gap is particularly pronounced with "new CIL," which is CIL that has emerged in "new generation" areas of international law such as human rights, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 838-42 (1997), whereby the state-to-state rules are designed to protect individuals within states, as opposed to more traditional international law regarding relations among states. In this realm, CIL is "less tied to state practice" and more tied to "General Assembly resolutions, multilateral treaties and other international pronouncements." *Id.* at 839. Thus, the on-the-ground practitioners (those law enforcement officials on the front lines of either ensuring or violating human rights) are often many steps removed from the state officials, diplomats, and legislators who negotiate and agree to norms, and whose pronouncements seem to be significant in the constitution of CIL. Consider again the *Filartiga* case, discussed *supra* note 205. The Court's extensive survey of official enactments and pronouncements that support a CIL prohibition of torture did not include any systematic perusal of actual prison, detention, or interrogation practices. *Filartiga*, 630 F.2d 876. The *Filartiga* opinion is cognizant, yet dismissive, of the gap between official pronouncements and actual practice. *Id.* at 884 n.15 ("The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law . . . 'States often violate international law, just as individuals often violate municipal law'" (citations omitted)). This treatment of the gap between norms and practice is dissatisfying because CIL owes its very being to practice. Moreover, the example of torture is not an isolated case. In the area of environmental custom, some scholars note a disconnect between norms and practice, even though the norms are supposed to reflect practice. See generally Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105 (1995).

On a more theoretical level, and reflecting the reality that CIL is derived from official pronouncements (rather than from empirical evidence of actual practice), some CIL scholars believe and argue that CIL may reflect the naked "expression of legal views" even when "there is no widespread and consistent State practice, or even no practice at all, to back up those legal views." ANTONIO CASSESE, *INTERNATIONAL LAW* 122 (2001). This view has led to a doctrine whereby CIL can arise rather quickly, on the basis of a few official statements or votes, without the passage of time that would otherwise be necessary to describe state behavior as a pattern. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 2, reporter's note 2 (acknowledging "instant customary international law" and citing for support *North Sea Continental Shelf* (F.R.G. v. Den.) (F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20) [hereinafter *North Sea Continental Shelf*]); see also Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 IND. J. INT'L L. 23 (1965).

207. This disconnect between CIL and actual state practice, which has been legitimized through some contemporary international legal theory, see *supra* note 206; *infra* note 215 and accompanying text, has exposed CIL to scholarly backlash and criticism. See, e.g., J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 472 (2000) (arguing that CIL is a collection of paper norms inconsistent with regular state practice); Bradley & Goldsmith, *supra* note 206 (arguing that "new CIL" is "less tied to state practice" than it claims, and discussing *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), for its failure to consider actual state practice as opposed to resolutions, treaties, and other state pronouncements; also discussing how the Court in *Filartiga*, 630 F.2d 876, ignored state practice with regard to torture).

constitutive of law.²⁰⁸ This focus on practice, and on the technicalities of a trade, results in a virtual closing, or at least a sharp narrowing, of the gap between norms and practice.²⁰⁹

A second distinction between bottom-up lawmaking and CIL, and one related to the first point, concerns the substantive areas of international law and policy in which each process features. Because CIL is rooted in official state acts, pronouncements, and votes, it emerges in the domain of state action, typically public international law.²¹⁰ Thus, CIL has developed in areas such as the law of the sea,²¹¹ the law of treaties, diplomatic immunity,²¹² and human rights.²¹³ This Article's trade finance examples, on the other hand, unfold in a zone of private international law,²¹⁴ ordering the transactional interactions of market players such as exporters, importers, banks, and insurance companies.

Third, CIL obligations are usually rather general formulations akin to sound bites and amenable to regurgitation: for example, torture is a prohibited state practice; diplomats are generally immune from criminal jurisdiction; states exert exclusive jurisdiction in territorial seas extending three miles from their coastal borders. This generality may be in part a function of the diffuse, anarchic way that CIL is made and discovered. In addition, CIL must often reduce to a set of lowest-common-denominator pronouncements in order to envelop enough state practice to ensure that its norms may justifiably

208. For a discussion of transnational actors as opposed to international law's traditional state actors, see *infra* notes 218-223 and accompanying text.

209. The logical outgrowth is the blurring of the distinctions between legal compliance and lawmaking. See *infra* Part III.B.4 (discussing the lawmaking/compliance dichotomy). Under classic conceptions of CIL, lawmaking is tied solely to the practices of state actors who traditionally have played roles in official diplomacy, while the practices of many transnational actors, see *infra* notes 218-223, including local law enforcement officers, private corporations, and other individuals, are largely ignored.

210. Public international law is the law governing relations between states. CARTER ET AL., *supra* note 2, at 2.

211. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 2, pt. VI, Introductory Note (stating that much of the LOS Convention, *supra* note 202, is either a restatement of the law from a series of conventions adopted in 1958, which, in turn, were codifications of CIL, or a codification of CIL pertaining to the law of the sea that had emerged in the intervening years between these earlier conventions and 1982, when the LOS Convention was opened for signature).

212. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 2, pt. IV, ch. 6(A), Introductory Note (stating that "[t]here has been some disagreement as to details, but in general, the privileges and immunities of diplomatic personnel under customary international law have not been controversial, and have been almost universally respected in state practice," and noting their codification in the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, and the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261); EILEEN DENZA, DIPLOMATIC LAW: A COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS (1998).

213. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 2, § 702 (describing customary human rights law, including norms prohibiting genocide, slavery and the slave trade, "murder or causing the disappearance of individuals," "torture or other cruel, inhuman or degrading treatment or punishment," arbitrary detention, racial discrimination, and other "consistent pattern[s] of gross violations of internationally recognized human rights").

214. *Id.* § 101 cmt. c ("private international law (called conflict of laws in the United States) . . . has been defined as law directed to resolving controversies between private persons, natural as well as juridical, primarily in domestic litigation, arising out of situations having a significant relationship to more than one state."). But see *infra* notes 260-264 and accompanying text (discussing the traditional distinctions between private and public law and suggesting that they may no longer be useful).

constitute CIL.²¹⁵ By contrast, the rules reviewed in this Article are extremely detailed and technical, emanating from the highly particularized trade practices and terminology of discrete groups of similarly situated lawmakers.

While some of the rules contemplated in this Article certainly began as the customs of the lawmaking group, scholars have generally not included such technical, business-oriented rules within the classic CIL framework.²¹⁶ Bottom-up lawmaking is arguably analogous to a *lex mercatoria* process, whereby practitioners of a technical trade define and interpret their own rules through firm adherence to customary trade practice, with the ensuing efficacy of such rules leading ultimately to their appropriation as law.²¹⁷ Paradoxically, the *lex mercatoria*, as a form of lawmaking driven by custom and practice, is an example that CIL scholars do not frequently embrace or contemplate. In part, *lex mercatoria*'s absence from CIL reflects CIL's historic fixation on the state—state actors, official state acts, and the law of states—and its attendant analytic myopia. Likewise, CIL's inductive comfort zone is the highly vague formulation of official acts, reduced to a general and easily understandable norm, typically devoid of technicality and detail. Bottom-up international lawmaking is firmly rooted in custom. However, as a process that engages practitioners (private and public), that concerns itself with their on-the-ground practices, and that wrestles with the specific technicalities of such practices, it stands apart from traditional characterizations of CIL.

2. *Transnational Legal Process*

Scholars in the transnational legal process school recognize that a state's commitment to an international norm, even a weak commitment, may catalyze a domestic and international lawmaking process whereby state interests come to favor compliance or even obedience.²¹⁸ Specifically, transnational legal

215. The development of "special," "regional," or "particular" CIL is a device that scholars and judges have used to recognize CIL arising from a subset of states. For examples of rulings by the International Court of Justice that find and use special CIL, see *Asylum* (Colom. v. Peru), 1950 I.C.J. 266, 277 (Nov. 27); *Case Concerning Right of Passage over Indian Territory* (Port. v. India), 1960 I.C.J. 6 (Apr. 12); and *North Sea Continental Shelf*, *supra* note 206. For a scholarly discussion of particular CIL, see Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 28-31 (1974-1975); Anthony A. D'Amato, *The Concept of Special Custom in International Law*, 63 AM. J. INT'L L. 211 (1969).

216. This view is reflected in a historical overview of the UCP, which offers effusive praise for the UCP's capturing of practice, but nonetheless does not consider the UCP a codification of CIL because the rules are too technical. See DE ROOY, *supra* note 14, at 16-17 (1984) ("A distinction may be drawn within the Uniform Customs between the general provisions and the articles of a more technical nature The general provisions I would describe as codification of internationally accepted practices However, the Uniform Customs also contain more "technical" provisions Such provisions can only be considered applicable by virtue of explicit reference to Uniform Customs in the credit").

217. See *infra* notes 244-248 and accompanying text for a discussion of the *lex mercatoria* in the context of private lawmaking. See also CUTLER, *supra* note 197, at 180.

218. The domestic and international processes of defining and refining international rules, incorporating them into domestic legal systems, and enforcing them as domestic laws engage a multitude of transnational actors that repeatedly interact in various fora, coalesce in a type of epistemic community, and ultimately reconstitute state interests in support of the international rule. See Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995)); THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995). Koh draws nuanced distinctions between obedience and compliance, stating:

process involves three integrally intertwined sub-processes: (1) interaction among transnational actors generates international norms; (2) further interaction in national and supranational fora leads to interpretation of norms; and (3) concomitant internalization of international norms into domestic legal systems results in compliance and, if the internalization strategy is effective, obedience.²¹⁹

Bottom-up lawmaking, like transnational legal process, is a process-oriented theory. Ostensibly, transnational legal process provides a skeletal roadmap for this Article's bottom-up lawmaking examples. First, a community of similarly situated transnational actors coalesces in furtherance of substantive norms; next, the community interprets the norms; and finally, through legalization and formalization, certain domestic and international legal systems appropriate the norms. Transnational legal process scholars also celebrate the *transnational norm-entrepreneur*, as opposed to the state, as the driving force of international legal processes and thus appreciate that bankers, insurers, and technocrats can play a role in the evolution of international law.

Yet transnational legal process does not quite capture what is occurring in these examples. Most transnational legal process stories still climax with the well-worn story of a state actor committing to a formal international agreement or treaty.²²⁰ While scholars claim that international law "percolates up and down . . . from the domestic to the international level and back down again,"²²¹ they nonetheless relegate most of their analysis to a top-down approach, usually starting with a state-based treaty in the context of a banner headline national security or foreign relations question.²²² These scholars recognize how non-state actors play a role in translating the treaty's positive mandates into local practice, but neglect the reverse—how day-to-day practice

Compliance is norm-conforming behavior conditioned by exogenous forces, that is, the desire to reap certain benefits or avoid punishment; while obedience is endogenous, the voluntary accession to a norm incorporated into internal value systems. Compliance is contingent, dependent on the consequences of non-compliance (I will comply because I want X or do not want Y), while obedience is a non-contingent embodiment of a rule or a norm. While compliance may be begrudging, obedience is habitual, almost instinctual. Through obedience, international norms become an embedded part of a nation's legal fabric.

Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise*, 37 COLUM. J. TRANSNAT'L L. 281, 285 (1999) (citing Koh, *supra* at 2654).

219. As Koh states:

[Transnational legal process] can be viewed as having three phases. One or more transnational actors provokes an *interaction* (or series of interactions) with another, which forces an *interpretation* or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to *internalize* the new interpretation of the international norm into the other party's internal normative system. The aim is to 'bind' that other party to obey the interpretation as part of its internal value set The transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalize those norms; and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process.

Koh, *supra* note 218, at 2602-03, 2646.

220. Typical transnational legal process examples include the Anti-Ballistic Missile Treaty Reinterpretation Debate, *see* Koh, *supra* note 218, at 2646-48; the Middle East peace process, *see id.* at 2651-54; and the Clinton administration's Haitian refugee interdiction policy, *see* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 196-99 (1996).

221. Koh, *Transnational Legal Process*, *supra* note 220, at 184.

222. *Id.* at 194-95 (discussing examples of transnational legal process).

of certain lawmaking groups is constitutive of transnational norms (which may later become formal law). The examples herein may give an additional dimension to transnational legal processes, offering examples of a "transmission belt"²²³ that ascends from the technicalities of trade finance practitioners to the treaties of the WTO, from the depths of trade finance shops in large, multinational banks to judicial opinions in Texas, New York, and elsewhere. Bottom-up lawmaking is not merely a process of internalizing law as practice but also one of externalizing practice-based norms as law.

3. *Transgovernmental Networks*

Other scholars offer a transgovernmental network theory of international lawmaking.²²⁴ These scholars concede that that much international lawmaking occurs without the imprimatur of the diplomat but argue that the state nonetheless retains a crucial role through transgovernmental networks of similarly situated technocrats. Thus, the state, as a player in international lawmaking, is disaggregating and decentralizing into relatively autonomous transgovernmental communities.²²⁵ While these transgovernmental networks may regulate through traditional forms of international law such as treaties, they often prefer the flexibility of informal "soft" legal instruments, such as the memorandum of understanding.²²⁶ Transgovernmental network scholars conceive of lawmaking as an organic enterprise, harnessing the technical expertise of bureaucrats who do not possess heady titles but nonetheless intimately understand the practical exigencies of their particular issue areas.²²⁷

Transgovernmental network theory describes much that transpires in bottom-up lawmaking, and it is particularly apropos in the case of the Participants Group to the Arrangement, which is a bona fide transgovernmental export credit network. Lawmaking through transgovernmental networks is grounded in the experiences, practices, and problem-solving expertise of specialized government practitioners. The lawmaking group or network develops substantive rules largely for its benefit

223. Koh, *supra* note 218, at 2651 (introducing the "transmission belt" terminology).

224. See, e.g., Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002); Anne-Marie Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 199 (Gregory H. Fox & Brad R. Roth eds., 2000); Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 177 (Michael Byers ed., 2000); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041 (2003); Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept./Oct. 1997, at 183.

225. Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, *supra* note 224, at 200 ("the State is not disappearing; it is disaggregating. . . . Disaggregation provides flexibility and networking capacity, while preserving the fundamental attributes of Statehood").

226. Raustiala, *supra* note 224, at 22-23 (attributing transgovernmental networks' proclivity toward memoranda of understanding to their effectiveness and flexibility); Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, *supra* note 224, at 214-17 (noting that while cooperation can take place through formal treaties, much cooperation occurs through memoranda of understanding and informal organizations such as the Basel Committee on Banking Supervision and IOSCO, *see supra* note 197); *see also* Slaughter, *The Real New World Order*, *supra* note 224, at 190.

227. Keohane & Nye, *supra* note 178, at 266 (citing HERBERT A. SIMON, *THE SCIENCES OF THE ARTIFICIAL* 197-207 (1996)).

and likewise institutionalizes procedural and remedial rules to maintain the practical integrity of the substantive rules. Sometimes these rules find themselves embedded in more formal law and legal systems; other times they remain informal, often “supplementing” more traditional forms of international law.²²⁸

Yet because transgovernmental network theory arose in response to those who believe the state is fading as an important force in international lawmaking,²²⁹ transgovernmental network theorists perhaps unduly emphasize the transgovernmental component of their theory, as opposed to the network component.²³⁰ The Berne Union, a network of private *and* public export credit insurers, pools expertise and practical experience and operates much like a transgovernmental network. Yet the Berne Union prides itself on being “non-governmental” despite the fact that government bureaucrats are a significant (although not the sole) constituency.²³¹ The ICC’s Banking Commission is a network of mid-level bankers who are steeped in the technicalities of trade finance and pool their expertise and practical experiences into formulating transnational banking code, the UCP 500. While transgovernmental network theory appropriately locates lawmaking in its practical and technical foundations, it is myopic in granting public officials a monopoly. What is particularly interesting about these trade finance lawmaking examples is that the lawmakers, both public and private, operate in networks that translate technique and practice into law. Whether or not the lawmakers are part of a larger state apparatus seems immaterial to the path that the lawmaking enterprise follows.

4. *Private Lawmaking*

At a time when international scholars are focusing on the formulaic, top-heavy, treaty-based forms of law, domestic legal analysis is becoming less wedded to formal legal processes.²³² From the range of Shasta County,

228. Raustiala, *supra* note 224, at 6:

Under some conditions networks should make treaties work better. Under other conditions networks perform a gap-filling role: where treaties are politically or economically precluded, networks provide an alternative mode of cooperation. In still other situations networks may smooth the negotiation of treaties [T]he most plausible prediction is that transgovernmentalism will supplement, rather than supplant, the traditional tools of international law.

229. See, e.g., Jessica T. Mathews, *Power Shift*, FOREIGN AFF., Jan./Feb. 1997, at 50 (arguing that the emergence of powerful intergovernmental organizations will mean the decline of the nation-state and its role in international law).

230. Slaughter, *Governing the Global Economy through Government Networks*, *supra* note 224, at 202 (“[T]ransgovernmentalism is all about bringing the State back in as an important transnational actor.”).

231. When asked what the Berne Union means by “non-governmental,” the Secretary-General replied that the delegates do not make policy decisions and do not report back to government policymakers; rather, they are independent technocrats. Secretary-General Wiehl Interview, *supra* note 78.

232. As Professor Rosa Ehrenreich Brooks has noted, international legal scholarship is “out of sync” with a dominant trend in domestic legal scholarship, which is coming to recognize that social norms create law-like rules that inform behavior and practice independently of, or even in spite of, formal law. Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law”*, 101 MICH. L. REV. 2275, 2287 (2003) (“[J]ust as many domestic law experts are belatedly recognizing the critical importance of social norms to law, and the need to understand how norms and law interact,

California,²³³ to the diamond bourses of New York,²³⁴ many domestic legal scholars and economists are uncovering discrete examples of rule formation akin to bottom-up lawmaking. These scholars link their empirical insights under the rubric of "private lawmaking" and "social norm" scholarship.²³⁵ The central private lawmaking insight is that private, closely knit, homogeneous micro-societies can create their own norms that at times trump state law and at other times fill lacunae in state regulation but nonetheless operate autonomously.²³⁶ This observation may prove particularly useful in international law, where one of the nagging existential enigmas is how law can be effective without a centralized, state-driven enforcement mechanism on the global stage. The analysis of private lawmaking and social norm theorists illustrates "order without law" via potent, informal enforcement mechanisms linked to social group dynamics.

The insights of these scholars are especially relevant to this analysis because bottom-up lawmaking processes are quite reminiscent of private lawmaking and social norm-making processes.²³⁷ The private lawmaking

some international legal scholars are insisting triumphantly that international law has moved beyond 'mere' norms." For outstanding examples of the domestic literature on social norms, see Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); Eric A. Posner, *Symbols, Signals and Social Norms in Politics and the Law*, 27 J. LEG. ST. 765 (1998); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997).

233. The study of social norms among ranchers and farmers in Shasta County, California, forms the core of Robert Ellickson's classic work, *ORDER WITHOUT LAW*. See ELLICKSON, *supra* note 176.

234. See Lisa Bernstein, *Opting Out of the Legal System*, 21 J. LEGAL STUD. 115 (1992) (discussing the system of "private lawmaking" in the New York Diamond Dealers Club).

235. For the purposes of this Article, the social norm and private lawmaking literature is linked under the overall "private lawmaking" heading, and the terminology will be used rather interchangeably. In general, social norm scholars argue that groups create social norms that are just as potent as, and that sometimes preempt, state law. Social norms are an alternative to law. See ELLICKSON, *supra* note 176, 42-48, 53; see also Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 540 (1998). The private lawmaking scholars are not as resistant to the term "law." The private lawmaking and private legal system literature looks at how groups develop their own law. See, e.g., Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms and Institutions*, *supra* note 122; Bernstein, *Opting Out of the Legal System*, *supra* note 234, at 115-17. However, the two groups are joined by their fundamental belief that private practitioners may effectively create their own norms, rules, and even law independent of the state.

236. See ELLICKSON, *supra* note 176, at 177-78. Ellickson brilliantly documents how the residents of Shasta County, California, including ranchers and farmers, develop their own rules to mediate disputes that occur as when stray cattle wander onto a farm or ranch. While California law clearly allocates liability between ranchers and farmers for cattle trespass and fence damage, *id.* at 42-48, the Shasta County residents nonetheless develop their own rules for handling disputes under an "overarching norm of cooperation among neighbors." *Id.* at 53. For example, whereas state law generally relieves animal owners from liability for trespass on the open range, informal norms in Shasta County posit that "an animal owner should control his stock"; the community's rules thus assess liability to animal owners for the trespass and ensuing damage. *Id.* at 53. However, Shasta County residents essentially absorb de minimis damage and do not ask for case-by-case recovery from animal owners, maintaining instead a mental accounting of the damage upon the belief that "most residents expect to be on both the giving and receiving ends of trespass incidents." *Id.* at 54.

237. Some highly specific insights also seem particularly relevant, although an in-depth look is beyond the scope of this Article. For example, the ICC and the Berne Union operate like private legislatures and may showcase both the strengths and shortcomings of the private legislature model of lawmaking, see generally Schwartz & Scott, *supra* note 34, including the tendency for private lawmakers to be "captured" by the relevant constituency. See Stephan, *supra* note 34, at 685. Others concentrate on the role of institutions in private lawmaking and attempt to identify the types of institutions that are most effective in shepherding the private lawmaking process. Amitai Aviram, *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 YALE L. & POL'Y REV.

process begins with some homogeneous group, such as Orthodox Jewish diamond merchants in New York or California ranchers (private lawmakers), and trade finance bankers, credit insurers, or official export creditors (bottom-up lawmakers). Within each group, practice grounds substantive norms, which remain supple and malleable to maintain coincidence with practice.²³⁸ The substantive norms lie within a self-sustaining, self-contained legal system through which group members enforce and interpret the norms.²³⁹

Reputation is one cornerstone of private lawmaking theories. From the range in Shasta County to postings on bulletin boards in diamond bourses to cotton grower newsletter notices, reputational standing orders behavior within closed, homogeneous communities and checks deviance from the prevailing substantive norms.²⁴⁰ Similarly, in many of the lawmaking communities examined in this Article, reputational preservation is a strong ordering force, whether in the form of Berne Union hallway gossip or Arrangement notifications of rule deviation.²⁴¹ In the private lawmakers' examples, physical proximity ensures the types of repeat interaction that elevates reputation as an ordering force; in the rather technical and incestuous world of trade finance, group members must come together frequently at meetings and during the course of business transactions, and therefore must care about their reputations within the group.²⁴²

1 (2004) (using game theory to argue that pre-existing network enhance a private legal system's ability to enforce norms).

238. Lisa Bernstein, *Private Commercial Law in the Cotton Industry*, *supra* note 122, at 99 ("The trade rules are periodically revised to respond to technological advancements, market changes, and ambiguities revealed during disputes.").

239. *Id.* at 1728-31 (describing the procedural rules and adjudicative processes in the cotton industry's private legal system); Bernstein, *supra* note 234, at 124-30 (discussing the private arbitration system of New York diamond merchants).

Even in Shasta County, residents devised a type of self-contained legal system, not only developing substantive rules of liability for trespassing cattle but also developing self-enforcement mechanisms (be they gossip, a game of cattle "hide and seek," or, in rare instances, the threat of violence). ELLICKSON, *supra* note 176, at 53-61. Shasta County residents also developed rules governing which enforcement mechanism would apply to which violation of a substantive norm. The glue to this system was an "overarching norm of cooperation among neighbors." *Id.* at 53.

240. ELLICKSON, *supra* note 176, at 53 (observing that the maintenance of an upstanding, neighborly reputation guided Shasta County's sanctioning mechanisms, as well as the seemingly self-sustaining order); Bernstein, *supra* note 234, at 128, 145-48 (noting that among diamond merchants, the reputational impact of posting a notice about a member of a diamond bourse who does not comply with an arbitral award, or about a member's expulsion from the bourse, serves as a potent enforcement mechanism); Bernstein, *Private Commercial Law in the Cotton Industry*, *supra* note 122, at 1745-62 (noting the effectiveness of non-legal, reputation-based sanctions, such as reporting names of those who refuse to use and abide by the industry-sanctioned arbitration tribunal and decisions); Bernstein, *Merchant Law in a Merchant Court*, *supra* note 122, at 144 (1996).

241. See *supra* notes 121-122 and accompanying text (discussing the role of reputation in the overall maintenance of the legal system); see also Levit, *supra* note 82, at 134 ("Indeed, in the case of the Arrangement, reputation (or more precisely a state's desire to maintain a certain reputation) appears to impact Participants' compliance decisions.").

242. See *supra* notes 121-122 (discussing the repeat interactions among group members). See also Secretary-General Wiehl Interview, *supra* note 78 (noting that Berne Union members see each other "all of the time" and thus are less apt to deviate from their obligations). For a discussion of the role of repeat interaction in the private lawmaking literature, see Bernstein, *Private Commercial Law in the Cotton Industry*, *supra* note 122, at 1745-54 (noting the efforts among the industry to recreate the communal, repeat interactions that maintained reputation as an important ordering force when the industry was less diffuse); Aviram, *supra* note 237, at 17 (generally discounting the importance of reputation in newly formed private legal systems, but conceding that where "members interact with each other outside the network," reputation is an effective bond).

The lawmaking examples in this Article beckon private lawmaking scholars to take their analysis to the international stage, but thus far most have conservatively focused on micro-societies. Their unwillingness to expand the substantive scope of analysis derives primarily from their underlying belief that proximity and homogeneity are critical foundations for norm-generation.²⁴³ The bottom-up lawmaking examples given herein demonstrate that international and transnational practices do not necessarily preclude the formation of closely knit societies. One example that economists and social norm scholars are appropriating and exploring, and which is particularly relevant to the trade finance examples herein, is the *lex mercatoria*.²⁴⁴

The *lex mercatoria*, or law merchant, was a type of transnational commercial law that governed merchant activities at the fairs and ports of medieval Europe.²⁴⁵ The *lex mercatoria* is an early example of international

243. But see Snyder, *supra* note 14, at 389-95 (discussing ICC private lawmaking with respect to the UCP 500); Stephan, *supra* note 34, at 714-16 (discussing private international lawmaking in the UCP 500 context).

244. See, e.g., Robert Cooter, *Structural Adjudication and the New Law Merchant: A Model of Decentralized Law*, 14 INT'L REV. L. & ECON. 215, 216-17 (1994); Avner Greif, *Institutions and Impersonal Exchange: The European Experience* (May 2004) (Stanford Law School, John M. Olin Program in Law and Economics, Working Paper No. 284), available at <http://ssrn.com/abstract=548783> (last visited Dec. 12, 2004); Greif et al., *supra* note 122; Avner Greif, *Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders*, 49 J. ECON. HIST. 857 (1989); Gillian Hadfield, *Privatizing Commercial Law*, REG. 40, 41-42 (2001); Paul Milgrom et al., *The Role of Institutions in the Revival of Trade: The Medieval Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1 (1990); Symposium, *The Empirical And Theoretical Underpinnings of the Law Merchant*, 5 CHI. J. INT'L L. 1 (2004).

245. The law merchant was a type of customary law that closely tracked the business practices of the time. Medieval European fairs and commercial centers brought together geographically diverse merchants and goods as urbanization and specialization led to a division of labor among regions. WYNDHAM ANSTIS BEWES, *THE ROMANCE OF THE LAW MERCHANT* 101 (1923) (noting that fairs were a response to the reality of being "unable to produce everything," each nation contributing "his dish" and "each had all he wanted, having only to reach out the hand to have the produce of even the most distant countries"); LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 9 (1983) ("Merchants themselves found the transacting profitable, since no individual region could remain insulated from the attraction of staple commodities and novelty items emanating from distant marketplaces."). For a discussion of the economic growth, urbanization, and mushrooming of long-distance trade from the tenth to the fourteenth century, see Greif et al., *supra* note 122, at 746.

Feudal lords and other leaders had a strong interest in attracting as many foreign merchants as possible so as to provide a rich selection of goods and food and thus maintain the competitiveness of their fair. Foreign merchants would not attend fairs without assurances that transactions would be honored. Out of this combustible coincidence of mutual self interest, the *lex mercatoria*—at its most basic level a decision of officialdom to step aside and let the merchants govern themselves—was born. Some would argue that this treatment of the rulers is too benign. While the rulers certainly had an interest in promoting foreign trade and in not discriminating against foreign merchants, the merchant guild, a type of early commercial security arrangement, created a credible threat of collective counteraction. It was this threat that kept rulers in check and enabled merchants to govern themselves through the *lex mercatoria*. See generally Greif et al., *supra* note 122 (focusing on the Hanseatic League and its imposition of sanctions). In some ways, therefore, the Hanseatic League seems to have played a role very similar to the Participants Group to the Arrangement, a similarity that warrants further exploration.

The substance of the *lex mercatoria* admittedly has received much scholarly attention from legal scholars, historians, and political scientists. Many scholars have argued that much modern commercial law has its roots in the law merchant. See, e.g., Karyn S. Weinberg, *Equity in International Arbitration: How Fair is "Fair"? A Study of Lex Mercatoria and Amiable Composition*, 12 B.U. INT'L L.J. 227 (1994). Other scholars analyze the *lex mercatoria* from a choice-of-law perspective, arguing that the substance of the *lex mercatoria* offers a viable body of law, distinct from domestic or international law, that parties to commercial contracts may choose and that courts or arbitral tribunals could embrace. Klaus Peter Berger, *The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts*, 29 LAW & POL'Y INT'L BUS. 943, 949-50 nn.42-43 (1997) (citing numerous

bottom-up lawmaking in that it was not born from the mandates of a feudal lord or monarch;²⁴⁶ the merchants defined the law merchant through their own practice and custom.²⁴⁷ The merchants also maintained and enforced their own law through merchant courts, which asserted exclusive jurisdiction over merchant transactions in any particular city or fair.²⁴⁸ This discovery (or re-discovery) of the law merchant by those who are interested in lawmaking processes bodes well in two respects: for internationalizing the private lawmakers' analyses, and for turning the attention of some internationalists to on-the-ground practices.

While this Article shares certain insights with those who write in the private lawmaking and social norm traditions, it is not part of those traditions. Because many scholars in the private lawmaking and social norm schools are critical of state regulation of private life, and because they see themselves as offering an alternative to state law, their analyses are often truncated. They fail to ask further fundamental questions: to what extent are these private norms appropriated by the state or by other formal lawmaking institutions? Are instances of private lawmaking a mere way station or an alternative route

works, mainly European, that argue for an independent, transnational *lex mercatoria*); Georges R. Delaume, *Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria*, 63 TUL. L. REV. 575 (1988); Francesco Galgano, *The New Lex Mercatoria*, 2 ANN. SURV. INT'L & COMP. L. 99, 108-09 (1995); Keith Highet, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613 (1988); Barton S. Selden, *Lex Mercatoria in European and U.S. Trade Practice: Time to Take a Closer Look*, 2 ANN. SURV. INT'L & COMP. L. 111, 112, 121-24 (1995). Some of these scholars identify a "new" *lex mercatoria*, with roots in the medieval period and evolving to the present. See Berman & Kaufman, *supra* note 55, at 271-72 (1978) (arguing that the *lex mercatoria* is a distinct, transnational body of law, "founded on the commercial understandings and contract practices of an international community composed principally of mercantile shipping, insurance, and banking enterprises of all countries"); Clive M. Schmitthoff, *The Unification of the Law of International Trade*, 1968 J. BUS. LAW 105 (1968) (arguing that a new "law merchant" has been accepted by scholars throughout Europe and is driven by institutions such as the ICC and the U.N. Commission on International Trade Law (UNCITRAL)).

246. PHILLIP WARREN THAYER, *CASES AND MATERIALS IN THE LAW MERCHANT* xi (1939) (arguing that the *lex mercatoria* "was not a product imposed by an outside authority, either Parliament or Judge. It naturally grew up among the merchants in their attempts to find rules which would regulate their dealings and help to settle their disputes. It was evolved empirically in order to meet the practical exigencies which emerged in the actual day-to-day conduct of business. It was in this sense extra-legal . . . It was not strictly law until the usages were recognized and enforced by the Courts and thus acquired the character and name of Law").

247. "The grandeur and significance of the medieval merchant . . . is that he creates his own laws out of his own needs and his own views." W. MITCHELL, *ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT* 10 (1904). "The customary nature of the Law Merchant was by far the most decisive factor in its development: it made the law eminently a practical law adapted to the requirements of commerce; and as trade expanded and new forms of commercial activity arose—negotiable paper, insurance, etc.—custom everywhere fashioned and framed the broad general principal of the new law." *Id.* at 12. See also TRAKMAN, *supra* note 245, at 9 (discussing "respect for 'merchant' practice as a primary source of regulation"); Schmitthoff, *supra* note 245, at 106 (1968) (arguing that "[t]he remarkable feature of the old law merchant was that it was developed by the international business community itself and not by lawyers.").

248. MITCHELL, *supra* note 247, at 25. The decision-makers were merchants themselves, rather than professional lawyers, royal officers, or other public servants; merchant judges, sometimes known as consuls, were themselves professional merchants. As such, they were well-versed in merchant practice and, concomitantly, the evolving law merchant was able to adjust to meet the needs of the merchant class. TRAKMAN, *supra* note 245, at 13, 15 ("A merchant judge reputedly could better evaluate commercial matters. He was equipped to assess mercantile custom. He was expected to appreciate the needs of merchants, especially their desire to attain a speedy and low-cost determination of their disputes. He was able to perceive of changing trade dynamics and the need to reach a decision in accord with the realities of business.").

to more formal law?²⁴⁹ This Article's lawmaking examples suggest that a private form of lawmaking may be an interim stage of a more extensive lawmaking process.

Furthermore, private lawmaking analyses do not imagine that state actors may behave similarly to their private lawmaker counterparts. By contrast, the lawmakers in this Article's examples include not only quintessential private actors—bankers and credit insurers—but also official ECAs working in tandem with private businesses and individuals. Interestingly, these public actors behave and create their own rules in a manner quite similar to the private actors, rooting many substantive norms in practice, relying heavily on reputation to maintain compliance with substantive norms, and operating a self-sufficient and self-executing legal system. Just as the transgovernmental network scholars narrow their analysis to state actors, the private lawmaking and social norm scholars limit their analysis to private actors. Bottom-up lawmaking retains its structure whether the lawmakers are public officials, private parties, or both.

5. *International Lawmaking Theory: A Reprise*

Bottom-up international lawmaking showcases both the strengths and the shortcomings of extant lawmaking theories. From traditional conceptions of CIL it borrows the constitutive properties of customary practice. Bottom-up lawmaking nonetheless dives deeper, focusing on actual, on-the-ground practice, and it is simultaneously broader in scope, encompassing private actors and government technocrats. Like transnational legal process, bottom-up lawmaking involves an ongoing process of self-propagating and self-reinforcing interactions among transnational actors, rather than a climactic legal moment. It is often difficult to pinpoint its beginning and it often does not have an end. The bottom-up lawmaking examples transfer the attributes of private lawmaking from the ranches of Shasta County to a transnational plane, showcasing the ability of closed, homogeneous lawmaking groups to create their own substantive, procedural, and remedial norms as well as the potency of reputation in maintaining such a legal system. Transgovernmental network theorists, in some respect, transpose this same private lawmaking dynamic onto a transnational plane; instead of clubs of private actors, these scholars use networks of government technocrats with specialized expertise in arcane public regulatory issues.

Yet bottom-up lawmaking highlights how these lawmaking theories would benefit from refinement and cross-fertilization. CIL, purportedly born from state practice, is often quite removed from on-the-ground behavior. Likewise, in its existential link to official state acts, CIL excludes private individuals and technocrats from the lawmaking calculus. From transgovernmental network theorists, the private lawmaking scholars may further learn how their closed, homogeneous communities could assemble on a global scale and may come to appreciate that public officials often develop

249. *But see* Snyder, *supra* note 14, at 403-12 (arguing that the rules that come from private lawmaking groups, such as the ICC Banking Commission, are technically law).

law in a way that mimics the way of private actors. Similarly, transgovernmental network theorists should loosen their defense of the state and grow to appreciate that private actors, also, make law through networking. Transnational legal process scholars would benefit from greater understanding of what transgovernmental network scholars appreciate—how groups of practitioners transform their technical, specialized experience into law. Transgovernmental network scholars should more seriously heed the core transnational legal process insight that international law is now the realm of transnational actors and not merely the state.

While the bottom-up lawmaking stories in this Article share certain patterns and principles, they remain too isolated in their corner of trade finance law to constitute a counter-theory or alternative paradigm for international law.²⁵⁰ Yet precisely because the bottom-up lawmaking pattern is so pronounced within trade finance law it challenges and prods the prevailing international lawmaking theories, illuminating meaningful bridges and demolishing needless barriers.

B. *Bottom-Up International Lawmaking and the International Legal Taxonomy*

International lawyers are accustomed to drawing physical boundaries. Over the past several decades, international legal scholars have drawn their own boundaries, developing a taxonomy of rigid, either/or dichotomies—hard versus soft law, international versus comparative law, private versus public international law. Admittedly, these distinctions critically organized the discipline, adding scientific and methodical weight at a moment when legal realists challenged the discipline's very existence. These axes also added focus to international legal scholarship, preventing it from becoming too diffuse and therefore unable to defend against the realist attack. Yet as many prominent international legal scholars have already noted,²⁵¹ the prevailing dichotomies appear too rigid to accommodate the breadth, depth, and dynamism of contemporary international lawmaking.

This Article's bottom-up international lawmaking examples lend support to those who are becoming increasingly dissatisfied with the established international law taxonomy. The path followed by each of the bottom-up lawmaking processes discussed herein crossed one or more of the taxonomic boundaries without significant consequence. To force these fluid lawmaking

250. But see *supra* note 197 for a discussion of other examples that may fit within a bottom-up lawmaking structure.

251. See Koh, *Transnational Legal Process*, *supra* note 220, at 184 (arguing that transnational legal process breaks down traditional distinctions of public and private international law). Professor Brooks notes the limitations of the classic international law taxonomy. In a groundbreaking work on rule-of-law promotion efforts, Professor Brooks notes the futility (indeed the counterproductivity) of the distinction between international law and comparative law, especially when powers like the United States attempt to impose international legal norms without sensitivity to cultural differences. See Brooks, *supra* note 232, at 2286-88; Muchlinski, *supra* note 197, at 229 (arguing that the emergence of non-state actors as significant international lawmakers; the growth of regional and multilateral organizations; and the increased transnational use of "informal or unofficial regulatory orders based on such things as business practices, shared communal values, and professional perceptions of problems and their solution[s]" call for a new "legal order and methodology").

processes into one side of a dichotomy or another is to arbitrarily sever one part of the process from the other. The taxonomy, therefore, precludes holistic appreciation of bottom-up international lawmaking as an ongoing dynamic that travels from soft to hard law and from closed groups of lawmaking practitioners to international, regional, and domestic legal systems.

1. *Hard Law versus Soft Law, Binding Law versus Non-Binding Norms*

Thus far, this Article has used the term “international law” in its strict, formal sense as hard law (treaties and customary international law) in order to distinguish those international rules that are technically binding from those that are not.²⁵² Yet to rely on the formal categories of treaty and custom to distinguish binding international law from non-binding norms—or, otherwise put, to differentiate between hard law and soft law—is arbitrary and perhaps archaic.²⁵³ The three lawmaking trajectories plotted in this Article follow a similar course, with norms gelling first as some type of soft law, and ultimately hardening into binding international law. In each of these cases, a boundary divided the rules that lawyers would classify as binding law and those softer rules that do not quite make the cut. Yet the practical impact of this line appears largely semantic, for the rules effectively functioned as authoritative and binding on the lawmaking group (and in some cases others) before they crossed the magical line dividing hard law from other international rules and norms.²⁵⁴ The awkwardness in this categorical classification scheme breeds a type of schizophrenia regarding the bottom-up lawmakers’ self-understanding of the status of their norms.²⁵⁵ The conceptual misfit between the hard-and-soft law distinction and the bottom-up lawmaking dynamic invites two questions. First, what is the utility of separating law from other norms? Second, if no utility can be found, how should the line between legal and non-legal norms be drawn? Obviously, these questions lead to the greatest of all international jurisprudential questions—what is international law? While the resolution of these questions is well beyond this Article’s scope, a bottom-up lawmaking perspective should enrich the ongoing debate.

Some scholars convincingly argue that these formal labels are effective signaling devices, particularly significant at the moment when a state actor commits to an international norm.²⁵⁶ For instance, the “soft law” label may

252. See *supra* note 2.

253. See Levit, *supra* note 82, at 138-40 (“[T]he Arrangement fundamentally challenges us to ask whether the law (hard law)/non-law (soft law) distinctions are really about law being binding or non-binding or whether hard law and soft law divide along some other axis.”).

254. See, e.g., Levit, *supra* note 82, at 140 (noting empirical research on the Arrangement proving that Participants’ overall level of compliance did not significantly change as the law hardened).

255. While the Banking Commission states repeatedly that its decisions are not binding and do not have the force of law, it nonetheless touts their utility in helping courts solve disputes. See *supra* notes 56-59 and accompanying text. Similarly, the Berne Union rules are self-referentially not law, but they are also not mere underwriting decisions. See *supra* note 124 and accompanying text. Lawmakers in each of the lawmaking examples recognize that the “law” label does not apply to the basic rules—the Arrangement, Berne Union General Understanding, and UCP 500—but nonetheless realize that these rules are very potent, perhaps functionally binding.

256. International legal scholars convincingly argue that the drawing of lines between law and non-law can be quite functional. See Reisman, *supra* note 202 (arguing that the line between binding

lighten the perceived consequences of committing to a norm, thus politically or psychologically enabling some actors to pledge themselves to a norm that would be impossible if the same norm bore the “hard” or “binding” label.²⁵⁷ While these types of arguments have merit, they are less persuasive in the bottom-up lawmaking context because they presuppose a top-down model of lawmaking with an identifiable, often dramatic, commitment moment. Bottom-up lawmaking offers few such moments. Instead, practitioners’ commitment to norms is progressive, instinctual, and at times subconscious, rendering it difficult for the onlooker to gauge whether the practitioners view a certain practice as a soft norm or as hard law.

While the nature of the bottom-up lawmaking process limits the signaling utility of the hard law and soft law labels, this Article, on the basis of the examples developed herein, is unwilling to concede the normative weight of law all together. This Article is likewise unwilling to elevate all norms to the stature of law or, as the realists might, relegate all international law to the status of non-binding norms. So, if a line is to be drawn between international law and those norms that are not international law, where should this line be placed? The dominant international law approach is to draw the line along certain formalistic categories—treaties and CIL are in; everything else is out.²⁵⁸ This Article suggests that a functional rather than a formalistic approach to international law may more appropriately encompass the types of rules that bottom-up lawmaking generates.²⁵⁹ A functional approach, while its elaboration and development lie well beyond this Article’s reach, would allocate the title of “law” and its attendant normative strength to those rules that are viewed as authoritative and binding, and which have an impact on both the incentives and the expectations within their constituent groups. Under such an approach, bottom-up lawmaking produces law long before the WTO appropriates the Arrangement’s rules and long before a court decides a letter-of-credit dispute according to the UCP’s terms. Thus, the designation “law” becomes increasingly detached from semantic formality and more tied to practical reality.

(perfected) and non-binding (unperfected) international law is functional and should be preserved). On the power of non-binding norms and the utility of their use, see Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT’L L. 387 (2000).

257. See, e.g., Guzman, *supra* note 164, at 1880 (arguing that the classification of certain rules as “law” and certain rules as “something less than law” has particular weight at the moment of a group member’s commitment to a particular norm or piece of law). In this view, the commitment threshold is higher for those norms that are law and lower for those norms that are something less than law. For some of these scholars, including Guzman, the commitment threshold is a measure of reputational capital—the reputational costs of deviating from law are higher than the costs of deviating from something that is almost law. *Id.* This reputational stake in commitment to legal norms is due in part to the inherent normative weight of law and in part to the signaling or communicative functions of law.

258. See *supra* note 2 and accompanying text for a discussion of formalistic, categorical classifications of international law.

259. Some scholars have begun to develop a functional approach to international law, most notably Guzman, *supra* note 164 (“[r]econciling theory and practice requires a new theoretical approach, based on a revised definition of international law. It should be one that is functional rather than doctrinal. Rather than simply listing what is and is not considered international law, the new definition should describe the characteristics of international law. Instruments that fit that definition should be considered international law. . . . The definition of international law, therefore, should turn on the impact of a promise on national incentives.”). For a discussion of Guzman’s functional theory of international law as it pertains to the Arrangement, see Levit, *supra* note 82, at 138–41.

2. *Public International Law versus Private International Law*

Public international law has traditionally ordered relationships among states²⁶⁰ while private international law has traditionally governed relationships and litigation between private parties.²⁶¹ The examples of bottom-up international lawmaking suggest that these distinctions may have outlived their utility.²⁶² Are official export credit rules private international law or public international law? On the one hand, they order the behavior of states, placing mutual restrictions on the size of export subsidies; on the other hand, they provide technical parameters that not only define the contours of large, private transactions but also determine financing costs. Are the Berne Union rules private international law or public international law? The Berne Union rules target both government agencies and private insurers, who are assuming an increasingly important role in the Berne Union's niche of short-term export credit insurance.²⁶³ The rules themselves place technical limits on the insurance transactions and thus have a profound impact on the private transactions of exporters and importers. In an interconnected, transnational economy, the public law and private law labels inadequately capture the complexity and nuances of modern international regulation.²⁶⁴

3. *Comparative Law versus International Law*

Consider a law school curriculum. An international law course covers hard international law—treaties among states—with customary international law receiving secondary treatment.²⁶⁵ Soft international law receives mere passing mention. A comparative law course looks at individual states as legal innovators and gleans lessons that might be instructive to other states.²⁶⁶ Where would these bottom-up lawmaking stories be placed? Initially, they would not fall within an international law course because the foundational set of rules in each example was “soft” rather than “hard.” Of course, when an instrument such as the Arrangement becomes de facto hard law by virtue of its incorporation into a document such as the WTO's Agreement on Subsidies, it may appear in international law texts. But then students will see only a sliver of the story and will not appreciate where the rules came from or the nuances and complexities of the relationship between the WTO, the Arrangement, and the Berne Union. Likewise, the UCP 500 will likely not make it into an

260. See, e.g., Vienna Convention on the Law of Treaties, *supra* note 1.

261. See, e.g., CISG, *supra* note 197; The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163, T.I.A.S. No. 6638.

262. See generally CUTLER, *supra* note 197.

263. *Supra* note 97 and accompanying text.

264. Other scholars have noted the limited utility of the distinction between public international law and private international law. See Paul Schiff Berman, *From International Law to Law and Globalization*, COLUM. J. TRANSNAT'L L. (forthcoming 2005) (manuscript at 34-40, on file with author) (describing in detail the diminishing utility of the distinction and contemplating its breakdown within the global context); CARTER ET AL., *supra* note 2, at 2 (“The lines . . . between public and private international law have thus become somewhat artificial.”).

265. See *supra* note 2.

266. See, e.g., RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* (6th ed. 1998); RICHARD A. DANNER & MARIE-LOUISE H. BERNAL, *INTRODUCTION TO FOREIGN LEGAL SYSTEMS* (1994).

international law text because it is not technically a treaty or international agreement and is considered too technical to be customary international law. Nor would the UCP 500 be found in a comparative law text, for it does not feature a state as a legal innovator; in 'this' instance, the ICC Banking Commission is the innovator. Students may learn of the UCP 500 from a domestic commercial law text discussing the relationship between Article 5 of the U.C.C. and the UCP 500. Yet this too would reveal only a fraction of the lawmaking process. It is impossible to tell these bottom-up lawmaking stories completely within the rigid confines of either international law or comparative law courses. In order to capture these stories, and claim an important place for bottom-up lawmaking within the international law discipline, the discipline's classification scheme must become supple and flexible enough to encompass lawmaking processes which transcend the traditional divisions between international, comparative, domestic, and foreign categories.

4. *The Lawmaking and Compliance Dichotomy*

One last dichotomy, which may not be as common as the others, deserves discussion. In a bottom-up approach to international lawmaking, rules emerge from the practices of group members. If there is little distinction between practice and rules then an independent compliance analysis becomes a rather redundant exercise. The primary determinant of compliance becomes the extent to which an ongoing lawmaking process accurately reflects the practices and preferences of the group members.

In the international legal academy, the burgeoning compliance literature attempts to explain when and under what circumstances law will inform behavior.²⁶⁷ This literature has spurred new and insightful scholarship on institutional design, emphasizing both the management of compliance²⁶⁸ and the impact of reputation on compliance.²⁶⁹ Yet as in the cases explored herein, behavior itself is often the prime determinant of law. This analysis suggests, at a minimum, that scrutiny of lawmaking processes is an essential ingredient to any compliance analysis.²⁷⁰ Confronted with lawmaking processes such as

267. For examples of the compliance literature, see ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS (Edith Brown Weiss & Harold K. Jacobson eds., 1998); Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175 (1993); George W. Downs et al., *Is the Good News About Compliance Good News about Cooperation?*, 50 INT'L ORG. 379 (1996); Gunther Handl, *Compliance Control Mechanisms and International Environmental Obligations*, 5 TUL. J. INT'L & COMP. L. 29 (1997); Hathaway, *supra* note 190, at 1935; Raustiala, *supra* note 256, at 423-25; Beth A. Simmons, *Compliance with International Agreements*, 1 ANN. REV. POL. SCI. 75 (1998); *A Symposium on Implementation, Compliance and Effectiveness*, 19 MICH. J. OF INT'L L. 303 (1998); see also William Bradford, *International Legal Compliance: An Annotated Bibliography* (2004) (on file with author).

268. Chayes & Chayes, *supra* note 267.

269. See Guzman, *supra* note 164, at 1861-65 (calibrating the reputational costs of noncompliance against the severity of the violation, the reason for the violation, the clarity of the obligation, and implicit understandings); see also Hathaway, *supra* note 190, at 2011 (arguing that reputation plays a significant role in the state's decision to commit to a human rights treaty but not necessarily as strong of a role in maintaining compliance).

270. While the author's previous writing pertains primarily to compliance, a key ingredient in explaining compliance is the nature and course of the lawmaking process, including the evolution of the legal rules. See, e.g., Levit, *supra* note 82, at 101-18 (dissecting the slow, measured evolution of the Arrangement, the decision-making processes of Participants, the form of the Arrangement, and its

those described herein, compliance analysis cannot and should not be bifurcated from a more complete analysis of law and lawmaking.

5. *Looking Forward*

As scholars note with increasing frequency, and as bottom-up lawmaking demonstrates, international law often defies rigid categories. Perhaps a recasting binary distinctions in the form of a continuum would relieve discomfort with the classic taxonomy. Likewise, those who call attention to weaknesses in the categorization scheme should harness bottom-up as well as top-down lawmaking stories in furtherance of a new taxonomy. In any case, these bottom-up international lawmaking examples amplify the call for critical re-examination of the traditional international law categorization scheme and may help guide the discipline to more inclusive boundaries.

IV. THE LIMITS OF BOTTOM-UP LAWMAKING: TRANSPARENCY, ACCOUNTABILITY, AND THE DEMOCRATIC DEFICIT

A. *International Lawmaking Through Private Clubs*

Relatively closed, close-knit groups drive the ICC Banking Commission, Berne Union, and Participants Group lawmaking endeavors. These groups function as clubs and appropriately join the ranks of the Paris Club (which deals with sovereign debt restructuring), the IMF, the World Bank, and the WTO.²⁷¹ The club model of international lawmaking has important positive attributes, some of which this Article has already discussed.²⁷² Principally, in a closed, homogeneous group that assumes a club-like demeanor, reputation easily ascends as an important ordering and self-enforcement mechanism.²⁷³ Furthermore, the efficiencies that exist in smaller, closed groups may give rise to decision-making that is relatively effective and expedient. Yet clubs also are exclusive and secretive, tugging at democratic notions of how lawmaking should proceed.²⁷⁴

processes in providing an "Arrangement-based" explanation for high levels of compliance with The Arrangement, *supra* note 134).

271. See Keohane & Nye, *supra* note 178, at 265-72 (discussing the WTO as a model of "club-like" cooperation).

272. For an excellent example of the club model of international lawmaking in the context of international arbitration, particularly the ICC International Court of Arbitration, see YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

273. See *supra* notes 240-242 (discussing the role of reputation in the private lawmaking context).

274. This club model of lawmaking, with law made in secretive, exclusive settings, certainly raises the specter of monopolistic behavior—those within the particular lawmaking group may set the rules (presumably to their advantage) and then maintain secrecy and exclusivity as a way to preserve their rule-making monopoly. In fact, one political scientist has applied antitrust and cartel analysis to the Arrangement and has concluded that the Arrangement is a cartel that should be recognized as such. Evans, *supra* note 77. While these questions are certainly interesting and provocative, they transcend the scope of this Article.

1. *Exclusive Clubs*

Clubs tend toward the exclusive, and the international lawmaking clubs discussed in this Article are no exception. The Berne Union membership includes fifty-four credit insurers, both public and private. While some of these credit insurers are from developing countries,²⁷⁵ most are from the OECD states that account for an overwhelming volume of exports. Furthermore, small, start-up credit insurers in developing countries may not be able to satisfy the Berne Union's business-related membership requirements.²⁷⁶ While the Arrangement's membership organization—the Participants Group—is distinct from and not technically limited to OECD nations, the twenty-four Participants are, in fact, solely ECAs from OECD states,²⁷⁷ and the list has grown at a glacial pace.²⁷⁸ The Arrangement's soft form has permitted the Participants Group to proceed without any formal membership processes, which opens up the possibility that membership may become a subjective, popularity-based enterprise, effectively excluding any non-OECD or debtor country from the group.²⁷⁹ ICC membership is a precursor to Banking Commission membership, but it is very expensive to join the ICC,²⁸⁰ so the cost of admission tends to exclude businesses from developing countries, as well as smaller and newer businesses. Furthermore, the national committees of those states that have a committee may act in practice as national membership gatekeepers, and many less developed countries do not have national committees through which their businesses

275. See *supra* note 84 for a list of credit insurers from developing countries.

276. See *supra* notes 91-92 for the Berne Union membership requirements, which include minimum premium revenue and minimum turnover benchmarks. Nonetheless, if such a credit insurer has a link to a government, it is eligible to join the Berne Union's Prague Club for smaller ECAs. See Facsimile from Secretary-General Wiehl, *supra* note 5. See also *infra* note 323 (discussion of the Prague Club).

277. Australia, Canada, the Czech Republic, the European Community (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom), Japan, New Zealand, Norway, South Korea, Switzerland, and the United States. Hungary and Poland are Observers. OECD membership thus appears to be a *de facto* requirement.

278. South Korea became a Participant in 1997, and the Czech Republic in 2004. The latter was the only EU enlargement country that has become a member, with Hungary and Poland remaining Observers.

279. Elsewhere, the author has applauded the Arrangement for maintaining fluid entry and exit requirements, suggesting that this flexibility and "softness" lowered the commitment threshold and facilitated acceptance of and compliance with the Arrangement. See Levit, *supra* note 82, at 115. However, the lack of membership or accession processes enables Participants to maintain a by-invitation-only club. See The Arrangement, *supra* note 134, art. 3.

Indeed, developing countries have tried to break into the Participants Group in order to exert their influence on the direction of longer-term export credits, but the Participants have turned them away. Evans, *supra* note 77, at 70-71. But see *infra* notes 328 and 335.

280. For example, a U.S. company that wants to become a member of the ICC must join the U.S. national committee, *supra* note 28, at a minimum of \$5000 per year. The cost may be significantly higher depending on revenue and budget. See U.S. Council for Int'l Bus., Membership Info., at http://www.uscib.org/index.asp?documentID=721#how_to_join. When countries have national committees, ICC membership flows through those committees. See *supra* note 28.

could obtain entry.²⁸¹ Even within the membership, there is an exclusive club that carries disproportionate weight in decision-making, open only to those members from countries whose national committees pay a certain level of dues.²⁸²

The very technicalities of the trade finance business also preserve exclusivity. Each of the lawmaking groups has opted, either intentionally or unintentionally, to codify their substantive norms in a way that is relatively inaccessible to those outside of their immediate club. The UCP 500 is so technical, dense, and difficult to read that even those who work in trade finance often purchase summaries and attend specialized classes.²⁸³ Similarly, while the Participants Group admirably drafted specific rules in the Arrangement,²⁸⁴ the terms are technical and difficult to follow, frequently nesting terms of art ("pure cover," "commercial interest reference rate," and "country risk classification methodology") with multi-paragraph definitions lying within other definitions that are just as technical and cumbersome. The interesting question here is one of causation: is the drafting of inaccessible rules driven by the technicality of the business, or by the desire of those in the club to perpetuate its exclusivity? While any answer is speculative, it is worth noting the potential gatekeeping function of language.

Exclusivity permeates these institutions at a human level as well. The organizations' histories are replete with chummy anecdotes of backroom dealmaking.²⁸⁵ Especially in the case of the Berne Union and the Participants Group, the club members have developed personal camaraderie that is reinforced through repeated interaction in varied fora such as the OECD, the G-8, or the WTO. Furthermore, an unofficial revolving door policy often sends group members—be they ECAs, export credit insurers, or banks—on rotations through these transnational institutions and then back to their home organization.²⁸⁶ Consequently, these exclusive transnational clubs tend to import the power structures as well as the gender and racial biases endemic to

281. Direct ICC membership is available to businesses, but it is infrequently sought. ICC direct membership is also quite expensive, currently €1500 annually for local members. See Int'l Chamber of Commerce, ICC Membership, *supra* note 28.

282. All members from the same country vote collectively and cast a certain number of votes (between one and three) depending on the country. France, Germany, the United States, and the United Kingdom each have three votes; developing countries and smaller states with newer national committees, or with no national committee, have one vote. Individual members' influence on decision-making is thereby attenuated, with those from the larger OECD countries having greater sway. Ron Katz Interview, *supra* note 26; see also *supra* note 33.

283. American Banking Institute, Workshop on Letters of Credit in International Trade (Dec. 1, 1998). See also DEL BUSTO, *supra* note 11 (providing explanations of how the UCP 500 would resolve real life disputes); DEL BUSTO, CASE STUDIES ON DOCUMENTARY CREDITS, *supra* note 40 (offering article-by-article explanations for all 49 UCP 500 articles, as well as all 12 eUCP articles). Some might cynically accuse the ICC of deliberately using super-technical language in order to sell publications and generate income.

284. Levit, *supra* note 82, at 105-06.

285. Over the years, those who have negotiated the Arrangement have described the process in decidedly "club-like" language. See *supra* note 140. Dowell, *supra* note 77, speculates that the Berne Union was born in "an informal encounter in a bar in Berne . . . between Jacques Merlin of the Société Française d'Assurances pour Favoriser le Cr dit (now SFAC), Professor Bruno di Mori (SIAC—Italy), St. Enrique de Duo (CESCC—Spain) and Mr. (later Sir) Frank Nixon of ECGD." *Id.* at 3.

286. Kimberly Wiehl, the current Secretary-General of the Berne Union, is the first person to hold that position who came from a user of export credit insurance (JP Morgan Chase) rather than from a Berne Union member. Secretary-General Wiehl Interview, *supra* note 78.

banks, large insurance companies, and even certain government agencies.²⁸⁷ Indeed, there was a time, not too long ago, when each of these institutions resembled a type of good-old-boy network.²⁸⁸ The use of the term "Gentlemen's Agreement" rings deeper than mere rhetoric. The good news is that women are ascending within each of these institutions.²⁸⁹ Nonetheless, one must question whether the exclusivity and secrecy of club-based processes disenfranchise certain groups disproportionately.

2. Secretive Clubs

Another feature of a club is that it is secretive. These trade finance clubs are secretive not only in their processes and deliberations but also in their substantive rules. The Berne Union General Understanding is not a public document.²⁹⁰ The website is generic, providing little more than a few paragraphs of information on the Berne Union's history and its membership.²⁹¹ The annual report is a compilation of mini-articles documenting very generally trends in trade and investment.²⁹² While the Arrangement is now posted on the OECD website, the Participants did not disclose the Arrangement's text until the mid-1980s, almost a decade after the Participants began cooperating under the Arrangement's auspices.²⁹³ The ICC does not publish the UCP 500 on the Internet or in any other publicly available legal database; it holds a monopoly on the UCP's publication and earns income from each sale.²⁹⁴

287. See Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, *supra* note 224, at 232 (noting that one of the problems with the network model of lawmaking is the inherent risk of replicating the "old boy network"). This is generally consistent with a growing feminist critique of international law. See, e.g., HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* (2000); Rosa Ehrenreich Brooks, *Feminism and International Law: An Opportunity for Transformation*, 14 YALE J. L. & FEMINISM 345 (2002).

288. The Working Group that drafted the UCP 500 contained no women. UCP 500, *supra* note 15, at 6-7. The Banking Commission is comprised of approximately 80% men and 20% women, although female representation, especially from Asian banks, is on the rise. Ron Katz Interview, *supra* note 26. Since its founding in 1934 through 2003, the Berne Union membership annually has elected a President and Vice President. Of the approximately fifty individuals who have served (many for multiple years), only one was a woman (some have the title "Dr." rather than "Mr." or "Ms.," making it impossible to determine the gender; these ambiguous cases are not included in the cumulative number). See BERNE UNION YEARBOOK 2003, *supra* note 85, at 206-07. From 1934 to 2001, all Berne Union Secretaries-General were male. *Id.* at 202.

289. Note that Secretary-General Wiehl is an accomplished female banker. The chair of the Participants Group, who also heads the ECG, is a woman from Sweden, Brigitta Nygren. Janet West is the Head of the Export Credit Division of the OECD. Piper Starr, of Ex-Im Bank, was elected Vice President of the Berne Union in 2004. In addition, as institutions such as the Berne Union delve deeper into technical matters, they require the participation of those line workers and managers who have intimate knowledge of what is already an overly technical business. Interestingly, many of these mid-level managers are women.

290. After much trial and error, the author acquired a copy of the General Understanding from a member who has asked to remain anonymous. See *supra* note 107 for a description of the author's efforts to obtain the rules.

291. See generally Berne Union: International Union of Credit and Investment Insurers, at <http://www.berneunion.org.uk/>.

292. See BERNE UNION YEARBOOK 2003, *supra* note 85.

293. Evans, *supra* note 77, at 58.

294. A booklet version of the UCP 500 costs \$12.95, and a version that includes the eUCP costs \$24.95. See International Chamber of Commerce Bookstore, at <http://www.iccbooksusa.com/-index.cfm?fid=56&bookid=15> (last visited Dec. 12, 2004).

The lawmaking processes that create these substantive rules also lack transparency. The lawmaking institutions, particularly the Participants Group and the Berne Union, maintain transparency among group members to provide the assurance that all members are aware of and are abiding by the same rules.²⁹⁵ For those in the community, the institutional structures and processes help replicate a democratic process: the Participants Group, makes all decisions by consensus;²⁹⁶ the Berne Union has three working committees, but the membership, as a whole, approves all important decisions with strong supermajorities;²⁹⁷ and the ICC operates like a private legislature with drafting committees, committee deliberation and approval, and general assembly imprimatur.²⁹⁸ Perhaps these closed communities are model communal democracies *for the members*, but there is little transparency between the group and outsiders.

To outsiders, these processes are difficult to penetrate or influence. The Banking Commission claims not to have any written procedural rules governing its agenda or decision-making processes, but rather to have created rules in an ad hoc manner.²⁹⁹ The agenda-setting process is equally unclear, as is the way in which the Banking Commission decides when practice has sufficiently changed to warrant redrafting the UCP. The author has not found any record of the internal debates and deliberations that precede publication of a UCP edition, although the Banking Commission is relatively transparent in its reasoning post hoc through its periodic publication of opinions.³⁰⁰ At times the Banking Commission has entertained input from interested parties such as SWIFT³⁰¹ or the U.N. Commission on International Trade Law (UNCITRAL), but these instances seem to be exceptions to its way of doing business rather than a rule.³⁰² For its part, the Berne Union operates in a unique zone of secrecy.³⁰³ It does not provide outsiders with any concrete information about its rules, deliberations, or processes and does not disclose its governing statutes. Finally, very little about Participants Group and ECG decision-

295. See Levit, *supra* note 82, at 109 (discussing transparency-enhancing processes of Arrangement). See also *supra* notes 100-105 and accompanying text for a discussion of the Berne Union's transparency-enhancing procedures in specific types of transactions.

296. See *supra* note 141 and accompanying text (discussing Participants Group decision-making practices).

297. See *supra* notes 88-91 and accompanying text (discussing voting within Berne Union).

298. See Schwartz & Scott, *supra* note 34, at 607-08.

299. Ron Katz Interview, *supra* note 26 (noting that the Banking Commission does not have any hard, written rules of procedure).

300. See *supra* notes 40-43 and accompanying text.

301. See *supra* note 197.

302. See DE ROOY, *supra* note 14, at 16; E-mail from Ron Katz, *supra* note 30 (SWIFT and UNCITRAL may be consulted).

303. One U.S. State Department representative, in an informal discussion with the author following a presentation at the 2004 Annual Meeting of the American Society of International Law, suggested that the Berne Union is uniquely secretive. Conversation with Harold Burman, Office of the Legal Advisor, U.S. Department of State, in Washington, D.C. (Apr. 2, 2004). The author interviewed several Berne Union members who, on condition of anonymity, described the Berne Union as exceedingly secretive. The Secretary-General of the Berne Union admits that the organization is not as transparent as some other international financial institutions but notes that the organization is currently making strides to enhance transparency. The telephone interview itself seemed to the author to be part of a concerted transparency effort. See Secretary-General Wiehl Interview, *supra* note 78; see also Berne Union Press Release, *supra* note 107.

making processes is public other than the mere fact that all decisions are by consensus. However, a recent exchange between environmental groups and the Chair of the Participants Group alludes to an incipient process of "consultation" with "civil society."³⁰⁴ In addition, the OECD recently published press releases announcing consultative meetings with NGOs³⁰⁵ and non-Participant countries.³⁰⁶

B. *Bottom-Up International Lawmaking and the Accountability Mismatch*

The perception that much international lawmaking occurs in private, to the exclusion of others, including some stakeholders, has sparked a wave of protests in recent years. From Seattle to Doha to Genoa, protesters question the legitimacy of international rules due to perceived democratic deficiencies

304. The exchange suggests that the Participants entertain opinions of outsiders, but it is unclear how often this occurs. Letter from Brigitta Nygren, Chairman of the Working Party of Export Credits and Credit Guarantees and the Participants to the Arrangement, to Bruce Rich, Environmental Defense (Mar. 24, 2004), <http://www.oecd.org/dataoecd/32/11/31499176.pdf> ("The Participants to the Arrangement on Officially Supported Export Credits met on 4-5 March and your first letter, which had been previously circulated, was discussed."). The exchange also suggests that there is an annual forum for NGOs to express their positions on key issues. *Id.* ("[A]s it was the case over the past several years, the ECG will hold a meeting later this year with Stakeholders, most likely in November (possible dates are being explored by the Secretariat) to exchange views on a range of export credit issues. In due time for such a meeting, you will of course be invited."). However, it is also clear from the exchange that NGOs view the current process as inadequate and perhaps even symbolically placating. Letter from Antonio Tricarico, Campagna per la Riforma della Banca mondiale, et al., to Brigitta Nygren, Chairman of the Working Party of Export Credits and Credit Guarantees and the Participants to the Arrangement, and Janet West, Head, Export Credits Division (Feb. 3, 2004), <http://www.oecd.org/dataoecd/-32/13/31499131.pdf>, stating:

To date, consultations with NGOs have typically been only a few hours. We would therefore respectfully request a consultative meeting with government representatives for one day, to exchange opinions on the Arrangement and renewable energy as well as on the implementation of the Common Approaches. Half a day might be spent on each. We would also like to be able to have the opportunity to comment on the agenda for the day long meeting, along with other interested parties Furthermore, we respectfully request that you make available as many as 20 seats for self-selected NGO participants. . . . Since many southern partners may also be interested in attending the meeting, but are unable to do so for financial reasons, we would also seek your assistance in providing financial support for the travel and accommodation costs of those of us traveling from developing countries.

See also Letter from Bruce Rich, Environmental Defense, to Mike Roberts, Vice-Chairman of the Working Party on Export Credits and Credit Guarantees and Janet West, Head, Export Credits Division (June 3, 2004), available at <http://www.oecd.org/dataoecd/61/10/32069117.pdf>, stating:

We hope that in the future a more coherent, more transparent, and less irregular process could finally be agreed on for consultations between the ECG, Participants to the Arrangement, and civil society. We note that such requests have been made to the OECD ECG and Secretariat in continual correspondence from NGOs for nearly seven years. Although some progress has been made over the years, the latest requests of our organizations for consultations this spring, the rejection of these requests in March, and then the very sudden, short notice announcement of consultations on June 25 reflects the need for a more regular process. It constitutes, in our view, a regression in terms of what is already, in terms of international good practice, a process which still suffers from a serious participation and transparency deficit.

305. OECD, OECD Countries and Civil Society Organisations exchange views on export credit issues, at http://www.oecd.org/document/29/0,2340,en_2649_34199_32393501_1_1_1_1,00.html (last visited Dec. 12, 2004).

306. OECD, OECD Countries and Non-Member Economies exchange views on export credit issues, available at http://www.oecd.org/document/53/0,2340,en_2649_34199_32371189_1_1_1_1,00.html (last visited Dec. 12, 2004).

in international lawmaking institutions. While the precise meaning of democracy and exact requirements of democratic processes remain points of heated academic debate,³⁰⁷ the common bedrock principles are consent of the governed and decision-maker accountability.³⁰⁸ Accountability means simply that those governed may make demands on the governors.³⁰⁹ Admittedly, accountability in international lawmaking institutions is currently receiving considerable scholarly attention.³¹⁰ While a thorough examination is beyond this Article's scope (and certainly deserves an article in itself), it is still worth contemplating accountability problems in the context of these bottom-up lawmaking processes that proceed rather unobtrusively but, nonetheless, eventually make law.

Within the bottom-up lawmaking model, lawmaking processes begin modestly. The lawmaking groups are small and homogeneous, rooted in and committed to their practices, and bound by a common normative mission. In these groups the governors and the governed are generally identical. Yet as lawmaking processes progress, the number of entities "governed" inevitably grows. These trade finance lawmaking communities have begun to make rules that impact those outside the original lawmaking group, resulting in an accountability "mismatch"³¹¹ or a "democracy deficit."³¹² This mismatch

307. For a sampling of democratic theory, see NORBERTO BOBBIO, *DEMOCRACY AND DICTATORSHIP: THE NATURE AND LIMITS OF STATE POWER* (1989); ROBERT DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956); HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (1961); CARLOS SANTIAGO NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* (1996); ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995). For an overview of these competing theories, especially as they relate to accountability in international politics, see Andrew Moravcsik, *Is there a 'Democratic Deficit' in World Politics? A Framework for Analysis*, 39 *GOV'T & OPPOSITION* 336, 338-343 (2004) (discussing libertarian, pluralist, social democratic, and deliberative notions of democracy).

308. David Held & Mathias Koenig-Archibugi, *Introduction*, 39 *GOV'T & OPPOSITION* 125 (2004) ("[T]here is agreement among democrats that wherever power is exercised there should be mechanisms of accountability"); Robert Post, *Democracy and Equality*, Paper Delivered at The Limits of Democracy, Seminario en Latinoamérica de Teoría Constitucional y Política (June 11, 2004) [hereinafter SELA Conference], available at <http://islandia.law.yale.edu/sela/SELA%202004-PostPaperEnglishSELA2004.pdf>. Post cited as an "unobjectionable premise" the contention by BOBBIO, *supra* note 307, at 137, that "democracy refers to 'the distinction between autonomy and heteronomy: Democratic forms of government are those in which the laws are made by the same people to whom they apply.'" Post, *supra*, at 1.

309. Stephan, *supra* note 34, at 684 ("I assume that the kinds of accountability that matter are those by which the governed exercise control over their governors."); Held & Koenig-Archibugi, *supra* note 308, at 127 ("Accountability refers to the fact that decision-makers do not enjoy unlimited autonomy but have to justify their actions vis-à-vis affected parties, that is, stakeholders").

310. See, for example, the papers presented at the Miliband Conference on Global Governance and Public Accountability, London School of Economics and Political Science (May 17-18, 2002), reprinted in 39 *GOV'T & OPPOSITION* 132-391 (Apr. 2004): Miles Kahler, *Defining Accountability Up: The Global Economic Multilaterals*, *id.* at 132; Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, *id.* at 159; Thorsten Benner, Wolfgang H. Reinicke & Jan Martin Witte, *Multisectoral Networks in Global Governance: Towards a Pluralistic System of Accountability*, *id.* at 191; Jan Aart Scholte, *Civil Society and Democratically Accountable Global Governance*, *id.* at 211; Michael Zum, *Global Governance and Legitimacy Problems*, *id.* at 260; Patrizia Nanz & Jens Steffek, *Global Governance, Participation and the Public Sphere*, *id.* at 314; Moravcsik, *supra* note 307, at 336; David Held, *Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective*, *id.*, at 364.

311. This Article borrows this term from Mariana Mota Prado, J.S.D. candidate, Yale Law School. Although she introduced the term in a different context, see Mariana Mota Prado, *Independent Regulatory Agencies and the Electoral Accountability of the President*, Paper Delivered at the SELA

generates demand among non-lawmakers to participate in the lawmaking process. It can be attributed to three convergent trends: first, globalization; second, exclusivity's coming to assume an independent normative role; and third, the hardening of softer, flexible rules into law.

First, consider how globalization, facilitated by the communications revolution, contributes to the accountability mismatch. If an ECA that is a Participant to the Arrangement engages in co-financing with a non-Participant ECA, the non-Participant, *de facto*, must abide by the Arrangement as well.³¹³ As globalization progresses and mega-multinational companies become increasingly involved in ECA-supported infrastructure projects, NGOs concerned for human rights and environmental protection steadily increase their accountability demands on ECAs.³¹⁴ Similarly, as globalization brings previously unlikely trading partners together, a seller will unquestionably require the certainty and predictability of a letter of credit governed by the UCP 500 as opposed to the whims of a remote legal system. Yet remote banks issuing credit on behalf of importers in developing countries, by virtue of the relatively high threshold of ICC membership requirements, have at most an attenuated say in Banking Commission decisions. Importers, who have no choice but to accept the UCP 500 if they want to consummate the underlying transaction, also have no influence on the development of the UCP 500, for the Banking Commission does not involve buyers and sellers in its deliberations. Additionally, the Internet revolution has spawned companies such as TradeCard,³¹⁵ which strive to harness electronic media to discover more efficient and less labor-intensive alternatives to the letter of credit.³¹⁶ To

Conference, *supra* note 308 (June 12, 2004), available at <http://islandia.law.yale.edu/sela/-SELA%202004/MotaPradoPaperEnglishSELA2004.pdf>, the term is quite relevant here.

312. See Moravcsik, *supra* note 307, at 336 (whether international institutions suffer from a "democratic deficit" is perhaps "*the central question . . . in contemporary world politics*") (emphasis in original).

313. Co-financing relationships between two credit insurers or ECAs usually arise because national content rules prohibit any one from financing the entire deal. In many cases, co-financing will take place between a Participant and a non-Participant. "By virtue of one ECA being bound by the Arrangement, the financing terms of the integrated package typically conform to the Arrangement's terms and conditions. Co-financing arrangements, in addition to facilitating finance for export transactions sourced from more than one country, raise the regulatory standard to the 'greatest common denominator.'" Levit, *supra* note 82, at 121-22.

314. NGO vigilance of ECA activity has recently shown a marked increase. ECA Watch, for example, is an NGO devoted solely to monitoring the activities of ECAs, especially with regard to trade in defense articles and the impact of ECA-supported trading on the environment and indigenous rights. On its homepage, <http://www.eca-watch.org>, the organization calls its mission a "Global Campaign Against Export Credit Agencies." For an example of an ECA Watch publication, see ECA Watch, *The Dirtiest Secret of Globalization*, available at <http://www.eca-watch.org/eca/eca-flyer-english.pdf>. See also Aaron Goldzimer, *Worse than the World Bank: Export Credit Agencies—The Secret Engine of Development*, in 9 FOODFIRST BACKGROUNDER (Inst. for Food and Dev. Pol'y ed., 2003) (discussing the negative environmental implications of ECA activities), available at <http://www.foodfirst.org/pubs/backgrdrs/2003/w03v9n1.html>.

315. TradeCard, Inc. is an online provider of financial settlement products for international trade transactions, including products that function much like letters of credit. However, TradeCard does not run its transactions through a bank; instead a patented software program checks the documents and an export credit insurer essentially provides a "guarantee" in the face of buyer default. See www.tradecard.com. TradeCard has a few competitors, including Bolero, an AIG product, and a new product introduced by CIT Group.

316. Gabriel Kahn, *Financing Goes Just-in-Time*, WALL ST. J. ONLINE, (June 4, 2004), available at <http://www.webreprints.djreprints.com/1002060462025.html> (last visited Dec. 12, 2004);

date, these companies have not played a role in Banking Commission deliberations.³¹⁷

Second, in each group exclusivity has changed from a functional tool, initially used to solidify the substantive rules, to a foundational norm. In other words, to some extent the groups seem to be promoting exclusivity for exclusivity's sake.³¹⁸ The Banking Commission, an entity originally constituted to develop transnational rules to support letters of credit in their critical role in international trade, has evolved into a group first and foremost of trade finance bankers who conservatively cling to the letter of credit in significant part to preserve their line of business. The Banking Commission has been lukewarm to the notion that institutions other than banks may issue letters of credit.³¹⁹ Similarly, it tends to dismiss innovative companies such as TradeCard as making counterproductive departures from the letter of credit, instead of investigating how such firms might help trade finance evolve beyond the traditional letter-of-credit business dominated by commercial

Caroline Van Hasselt, *Dump LC Headaches Overboard*, 14 TREASURY & RISK MGMT. 45 (2004), available at http://www.tradecard.com/news/articles/TreasuryRiskManagement_062004.pdf (last visited Dec. 12, 2004).

317. Telephone Interview with Barry Lites, General Counsel, TradeCard, Inc. (July 9, 2004) [hereinafter Telephone Interview with Barry Lites] (stating that TradeCard has never participated in Banking Commission deliberations, and has never been invited to do so). The ICC Banking Commission claims that it would be open to the participation of companies such as TradeCard, see Ron Katz Interview, *supra* note 26, but it remains dominated by traditional banking institutions. See *infra* notes 319-320 and accompanying text. The Banking Commission published the eUCP in 2002, several years after the electronic revolution had transformed banking and payment systems. See *supra* note 39. The membership of the Working Group on the UCP Supplement for Electronic Presentation more or less mirrored that of the UCP 500 Working Group: primarily bankers (eleven of nineteen) and law professors (two of nineteen), with the notable addition of major logistics providers (Maersk/Volkswagen Transport), a payment provider (SWIFT, see *supra* note 197), and a foreign exchange specialist (Foreign Exchange Dealers of India). The Working Group did not include any non-banking entities, such as TradeCard, that are trying to use the Internet to improve upon the extant letter-of-credit business. INT'L CHAMBER OF COMMERCE, UCP 500 + EUCP, *supra* note 24, at 3-4, 52 (listing the members of the Working Group on the UCP Supplement for Electronic Presentation).

For a more academic discussion of electronic letters of credit, see Jacqueline D. Lipton, *Documentary Credit Law and Practice in the Global Information Age*, 22 FORDHAM INT'L L.J. 1972, 1982 (1998) ("[T]he commercial credit system is premised on trading in documents in place of tangible goods . . . As electronic commerce gains currency, however, both the use of paper documents and the need to ship goods at all are decreasing"); see also Ben Wilkinson, *Life After the E-Bubble*, in BERNE UNION YEARBOOK (2003), *supra* note 85, at 53 (noting that although the Internet bubble has burst, the economy continues to grow and offer new options for the export finance community).

318. Berne Union Secretary-General Wiehl objects to the use of "exclusivity" as a descriptive term, noting that the Union has added four new private members and two ECAs in the past four years; she also comments that the organization is "open to all who qualify [i.e., meet the business criteria] and who members approve." Facsimile from Secretary-General Wiehl, *supra* note 5. Nonetheless, she admits that a perception of "restricted membership" surrounds the organization. Williams, *supra* note 182. Indeed, the Berne Union does still bear some of the hallmarks of a members-only club: applicants for membership must receive the approval of the existing members and then undergo during a two-year trial period of observer status; the business criteria for membership are relatively difficult for new businesses (which likely come disproportionately from developing countries) to satisfy; and the organization remains opaque to outsiders.

319. In a recent policy statement, the Banking Commission discouraged the use of letters of credit not issued by a bank, but said the practice was not a per se violation of the UCP 500. Commission on Banking Technique and Practice, Opinion: When a non-bank issues a letter of credit (Oct. 30, 2002), available at http://www.iccwbo.org/home/statements_rules/statements/2002/when_a_non-bank_issues.asp.

banks.³²⁰ The Berne Union, a group of credit insurers founded to facilitate the exchange of information among members on a confidential basis in order to further sound insurance and underwriting practices, has become a group rooted in secrecy. The Secretary-General offered no reason for her institution's steadfast commitment to secrecy other than noting a type of normative inertia—it is just how the members have always done it, and it takes time to make changes.³²¹

Finally, as bottom-up lawmaking processes produce soft norms that evolve into hard law, the rules tend to impact groups beyond the original rule-makers, thereby triggering demands for expanded participation. For instance, the Berne Union rules, through their appropriation by the Arrangement, are now also part of EU law, with a direct effect in all EU member states, including the ten new enlargement members. Yet for the most part, credit insurers from central and eastern European countries did not have a say in the drafting of the original Berne Union rules or in their continued acceptance.³²² The Berne Union admittedly has created an affiliate organization, the Prague Club, for ECAs from central and eastern Europe and the former Soviet republics which do not meet the Berne Union membership requirements but nonetheless desire to be heard and to learn how to apply the Berne Union rules.³²³

The UCP drafting process, supplemented by the Banking Commission's interpretive opinions, deprives many users of letters of credit, particularly exporters and importers, of meaningful input into the UCP's evolution.³²⁴ Nonetheless, the UCP often displaces significant portions of commercial codes such as the U.C.C., which have been approved by democratically

320. For example, when the author asked a Banking Commission representative if a company such as TradeCard could participate in the Commission's deliberations, that representative gave a mixed response. The representative noted that TradeCard is not a proponent of traditional letters of credit. At the same time, however, if TradeCard joined the ICC via the U.S. national committee and then requested to join the Banking Commission, it could do so. Ron Katz Interview, *supra* note 26. However, joining the ICC through a national committee is prohibitively expensive. Telephone Interview with Barry Lites, *supra* note 317. Even if a company such as TradeCard did join the ICC and request to be placed on the Banking Committee, it would have to vote as part of a block with the other U.S. Banking Commission members, which would likely still be large banks with a strong interest in maintaining the status quo. See *supra* note 33 and accompanying text. It seems that neither the ICC nor any other banking organization would have much interest in speaking with TradeCard to the extent that it is perceived to challenge the banks' hegemony in trade finance. Telephone Interview with Barry Lites, *supra* note 317.

321. Secretary-General Wiehl Interview, *supra* note 78.

322. Today, the Berne Union membership includes the ECAs from Hungary, the Czech Republic, Slovenia, and, since October 2004, the Slovak Republic. See *BERNE UNION YEARBOOK 2003*, *supra* note 85, at 129; Berne Union Press Release, *supra* note 107. However, none of these ECAs were members when the General Understanding rules were drafted.

323. The Prague Club includes ECAs from the following countries: Albania, Belarus, Bosnia & Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Iran, Jordan, Lithuania, Macedonia, Oman, the Philippines, Poland, Romania, the Slovak Republic, Slovenia, South Africa, Thailand, Uzbekistan, and Zimbabwe. Saudi Arabia and Serbia & Montenegro are observers. Anne Lise Sandvig, The Prague Club, in *BERNE UNION YEARBOOK 2003*, *supra* note 85, at 38-39.

324. The UCP Working Group was comprised solely of law professors and bankers. See *supra* note 31 and accompanying text. Although the Banking Commission claims that channels exist through which to glean input from those in the transport and insurance industries, *supra* note 302 and accompanying text, there does not seem to be an institutionalized mechanism. The group that drafted the eUCP seems to be better about including those outside the banking and academic community, *supra* note 317, although they too did not go so far as to include providers of alternatives to letters of credit.

elected legislatures.³²⁵ There are indications of mounting distrust of the UCP 500 and the Banking Commission among exporters and importers. For instance, the Banking Commission recently issued a document entitled "ICC Banking Commission guidelines for dealing with queries that could be the subject of court action" (Guidelines) stating that the Banking Commission will continue issuing purely *advisory* opinions (based on hypothetical situations) but will always defer to local courts in the face of live disputes.³²⁶ These Guidelines may reflect the Banking Commission's self-preservation impulse in the face of increasing wariness among exporters and importers about an organization that sets and interprets the rules that courts use in assessing liability but that nonetheless remains exclusive and closed in its lawmaking processes.

The relationship between the WTO and the Arrangement most dramatically illustrates how legal hardening has broadened bottom-up law's reach well beyond the group of governors. The Arrangement's incorporation into the Agreement on Subsidies as a safe harbor mechanism does more than just elevate the Arrangement's legal status. It also does three critical things: it defers to the Arrangement and the Participants Group for the regulation of export credits within the WTO framework; it helps ensure that the export credit systems of Participant countries are compliant with the Agreement on Subsidies; and it in effect requires non-Participants to adhere to the Arrangement in order to insulate their export credit activities from the WTO's prohibitions. A recent aircraft finance decision serves to underscore and publicize the powerful role that the Arrangement plays within the WTO system.³²⁷ Recognizing that the Arrangement has ascended in the legal hierarchy, non-Participants, particularly in developing countries, are now demanding greater transparency and input into the Arrangement's lawmaking processes.³²⁸

325. See *supra* notes 56-70 and accompanying text.

326. ICC Banking Commission, Guidelines for dealing with queries that could be the subject of court action, at http://www.iccwbo.org/home/banking/court_action.asp ("The Banking Commission will only respond to the facts in any query as they are presented to the Commission. If the facts do not reflect the actual circumstances of the case or dispute, that is not a matter for the Banking Commission, but for the courts or other legal bodies to decide, if the dispute later results in a court action.").

327. WTO Dispute Panel Report on Brazil Export Financing Programme for Aircraft, *supra* note 172.

328. This concern was best articulated by Brazil in its pleadings in the case:

[P]aragraph (k) [the safe harbor] makes clear that the developed country Members of the WTO that are also Members of the . . . OECD have taken care of themselves. It does so by providing that an export credit practice which is in conformity with the interest rates provisions of 'an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979' shall not be considered a prohibited export subsidy. This is a reference to the so-called OECD Arrangement or Guidelines. Brazil argues that developing countries did not bargain for the OECD "alternative" in the Uruguay Round. They are not members of the OECD. They have no voice in the OECD. . . .

Id. paras. 4.97-99.

In addition, several developing countries raised similar concerns following the Doha round of WTO negotiations. See Permanent Mission of India, *Intervention by India on the Proposal by the EC Captioned WTO Negotiations Concerning the WTO Agreement on Subsidies and Countervailing Measures (TN/RL/W/30)*, TN/RL/W/40 (Nov. 29, 2002) [hereinafter *WTO Intervention by India*], where India stated that:

C. Solving the Accountability Mismatch?

1. Accountability-Enhancing Mechanisms

What can be done to solve this accountability mismatch between governors and governed? One answer is clearly enhanced transparency—exposing lawmakers’ decision-making processes and reasoning. There seems to be some positive movement in this direction. Of the three lawmaking groups, the Participants Group (via the OECD) has made the greatest transparency strides. With each day’s drafting of this Article, and with each signing onto the OECD website, additional information is made available to provide glimpses into Arrangement-related deliberations and consultations. Moreover, the mere fact that the Berne Union spoke with the author and disclosed some of the organization’s processes orally, if not in writing, indicates that the Berne Union is moving toward greater transparency. The Secretary-General admitted that greater transparency is desirable,³²⁹ and in a press release in the autumn of 2004, the Berne Union publicly recognized the “importance of . . . transparency.”³³⁰ Perhaps it is just a matter of time.³³¹

The second solution is further consultation with stakeholders before, during, and after the lawmaking groups’ deliberations. The Berne Union, through the creation of the Prague Club, demonstrates its willingness to interact productively with non-members. The ICC Banking Commission will, from time to time, deliberate with other ICC Commissions such as those for insurance and transport, and will sometimes invite other institutions such as

The present provisions in respect of export credits has [sic.] virtually grand-fathered some of the OECD provisions on export credits into the WTO. Consequently, the GATT membership at large, with the exclusion of a selected few member countries, had no role in negotiating this provision. . . . The developing countries are in effect being asked to waive their rights to negotiate provisions on export credits, if the scope of [the] so-called safe harbor on export credits is expanded to include other forms of export financing in accordance with the OECD Arrangement. Another concern regarding the OECD Consensus is that non-OECD countries are not aware of the details of the Arrangement. To illustrate, under what circumstances is ‘matching’ permitted? How is Commercial Interest Reference Rate calculated? What constitute ‘market window’ operations? The questions are many, but very little information is available to non-OECD countries regarding the provisions and working of the Arrangement on official support of export financing. It is patently unfair to expect non-OECD countries to agree to any further inclusion in the [Agreement on Subsidies and Countervailing Measures] provisions of an Arrangement which was negotiated without their involvement and whose working is unknown to them.

See also Permanent Mission of Brazil, *Export Credits in the WTO*, TN/RL/W/5 (Apr. 25 2002) [hereinafter *Brazil on Export Credits in the WTO*] stating:

Another question that needs to be addressed is the interpretation by panels that the reference to the OECD Consensus gives a permanent ‘carte blanche’ to the participants of that Arrangement to alter WTO rules. . . . [N]on-OECD participants may be faced with a situation where, all of a sudden, their legislati[ve acts], once in perfect compliance with WTO obligations, become vulnerable to action under the [WTO Dispute Settlement Understanding] for the simple reason that OECD participants, with no warning, changed some provisions of their Arrangement.

329. Secretary-General Wiehl Interview, *supra* note 78.

330. Berne Union Press Release, *supra* note 107.

331. The correction of transparency problems in the OECD will likely be slowed by the requirement that disclosures within the Participants Group receive the absolute consensus of the Group. See Telephone Interview with Jim Cruse, *supra* note 138. See also *supra* note 141 and accompanying text.

UNCITRAL and SWIFT into its deliberations.³³² As noted, the Participants have started consulting with NGOs.³³³ In direct response to the Arrangement's ascendance to hard law within the WTO hierarchy, developing countries have begun clamoring to become a part of the Arrangement's lawmaking process.³³⁴ In an apparent response to pressure of this type, the Participants recently consulted with non-Participants from developing countries, important stakeholders given that Arrangement rules dictate the cost of financing to their importers.³³⁵ Furthermore, in the June 2004 redraft of the Arrangement, the Participants Group deliberately invites non-Participant ECAs to participate in some of the Arrangement's information-sharing and notification processes.³³⁶ The OECD's ECG³³⁷ will now "consider individual requests for

332. See *supra* note 302 and accompanying text. UNCITRAL's membership is more geographically diverse than the ICC's membership, especially in its involvement of developing countries. SWIFT is the "financial industry-owned co-operative supplying secure, standardised messaging services and interface software to 7,650 financial institutions in over 200 countries. SWIFT's worldwide community includes banks, broker/dealers and investment managers, as well as their market infrastructures in payments, securities, treasury and trade." SWIFT, About SWIFT, at http://www.swift.com/index.cfm?item_id=43232. See also *supra* note 197.

333. See *supra* notes 304-305. From the correspondence between the NGOs and the Participants Group, it appears as if the Participants Group rejected the initial demand for consultation over environmental guidelines and renewable energy. See Nygren, *supra* note 304. However, the Participants later changed their mind (perhaps in response to mounting demands for openness, not only by NGOs but also by non-Participants and the WTO) and scheduled a consultation on June 25, 2004. According to the OECD:

Representatives from Civil Society Organisations (CSOs) met in Paris on 25 June with OECD Members to exchange views on issues relating to the work undertaken at the OECD by the Working Party on Export Credits and Credit Guarantees (ECG) and the Participants to the Export Credit Arrangement The OECD Deputy-Secretary-General, Herwig Schlogl, welcomed the CSOs to this seventh annual consultations meeting and emphasised that the OECD export credit work was rated as highly important by its Members. The CSOs included representatives from the two OECD consultative bodies, the Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC), and from several NGOs including les Amis de la Terre, Urgewald, ECA-Watch Network, Environmental Defence, FERN, Finnish Association for Nature Conservation, Friends of the Earth Japan, Africa Network for Environment and Economic Justice (ANEEJ), Projecto Gato, the Corner House, WEED and Transparency International.

OECD, OECD Countries and Civil Society Organisations exchange views on export credit issues, *supra* note 305. However, the Participants did not give the NGOs much notice, which made the NGO's suspect of the Participants' motives. See Rich, *supra* note 304.

334. See *WTO Intervention by India*, *supra* note 328; *Brazil on Export Credits in the WTO*, *supra* note 328.

335. OECD, OECD countries and Non-Member Economies exchange views on export credit issues, *supra* note 306 ("Representatives from more than 40 countries interested in export credits issues met in Paris on 24 June 2004 at the OECD, bringing together representatives of both OECD countries and non-OECD economies. Representatives of Brazil, Chile, Chinese Taipei, Colombia, India, Israel, Hong-Kong-China, Peru, Romania and Slovenia exchanged views with the Members of the OECD's Export Credit Group (ECG) and Participants to the Export Credit Arrangement on several issues relating to the work undertaken at the OECD on export credit issues. Other countries invited but were unable [sic] to attend included Argentina, China, Russia and South Africa.").

336. The Arrangement, *supra* note 134, art. 4, at 7 ("Information Available to Non-Participants: (a) The Participants undertake to share information with non-Participants on notifications related to official support . . . (b) A Participant shall, on the basis of reciprocity, reply to a request from a non-Participants in a competitive situation on the financial terms and conditions offered for its official support, as it would reply to a request from a Participant.").

337. See *supra* note 160 and accompanying text.

observership,” offering potential opportunities for non-Participants to become more involved in the process of regulating official export credits.³³⁸

2. *Input versus Output Legitimacy*

The veil of secrecy and exclusivity shrouding the lawmaking institutions may have begun to lift, ever so slowly, enhancing accountability and reducing the democracy deficit, real or perceived. But openness may also lead to disintegration of the bottom-up lawmaking processes. As this Article has shown, these lawmaking processes often produce norms and then law that effectively order a massive volume of international trade. In accommodating the demands for more participation and openness, accountability-enhancing mechanisms will disrupt the homogeneity and exclusivity of the original lawmaking group, possibly tempting members to disband and reconstitute as even more private clubs with even more secretive rules. Do accountability

338. Nonetheless, it appears from the ECG's approach to considering such requests that achieving observer status will not be an easy task:

1. In determining its opinion, the ECG will apply the Council criteria of 'major player' and 'mutual benefit' in light of the following considerations whilst recognizing that this will not be done in a mechanical or automatic fashion, but rather in the context of individual requests. Additionally, the ECG may decide whether to recommend inviting observers on an ad-hoc basis or on a permanent basis.

2. The assessment of whether an economy satisfies the *major* player criterion may take into account the Committee's responses to, *inter alia*, the following indicative questions:

- (a) Does the applicant have in place a medium- and long-term export credit programme providing officially supported export credits?
- (b) What is the experience and performance that the applicant has demonstrated in export credit business, on the basis of the following quantitative and illustrative indicators: main characteristics of the export credit programme (objectives, technical features), annual flows of officially supported medium and long-term export credits (minimum figure), sectoral breakdown showing, in particular, exports of capital goods, markets targeted, in comparison with all ECG Members' [sic.] as well as on a regional basis among ECG Members?
- (c) Are the export credits programmes of the applicant in competition with those of the ECG Members?
- (d) To what extent is the applicant actively involved in other international export credit forums (e.g. International Union of Credit and Investment Insurers—the Berne Union, the Prague Club—Berne Union/EBRD supported forum)?

3. The assessment of whether an applicant satisfies the mutual benefit criterion may take into account the ECG's responses to the following indicative questions, among others:

- (a) To what extent is the applicant willing to exchange information with ECG Members on its officially supported export credits?
- (b) For *ad-hoc observers*: to what extent has the applicant a recognised interest in OECD guidance relating to export credits such as those discussed in the ECG or to what extent is there a specific interest by the ECG on an ad-hoc participation of the applicant?
- (c) For *regular observers*: to what extent is the applicant willing to apply the relevant guidelines/agreements/undertakings agreed and applied by the ECG Members?

4. In addition, the ECG's technical opinion as to whether these criteria are met is based on a full examination of the applicant's current and expected export credit programmes and policies and on the basis of sufficient information provided by the applicant.

5. In considering requests for observership, the ECG shall assess whether participation of the applicant as an observer would have a positive impact on the implementation of its programme of work.

OECD, Guidelines for use in Consideration of requests for Observership to the ECG (May 28, 2004) (emphasis in original), available at http://www.oecd.org/document/63/0,2340,en-2649_34169_31870463_1_1_1_1,00.html (last visited Dec. 12, 2004).

problems spell the unavoidable doom of these bottom-up lawmaking processes? Is there some theoretically palatable way to legitimate bottom-up lawmaking decisions if they occur within relatively unaccountable club-like structures? Or does the inevitably growing mismatch between the governors and the governed necessarily delegitimize the ensuing law?

The protesters of the past several years link legitimacy solely to democratic lawmaking processes, to what some scholars label "democratic inputs."³³⁹ Some scholars, particularly those who tout a transgovernmental network model of lawmaking, fundamentally question whether democratic processes as understood in the domestic context are the appropriate legitimating standard for international lawmaking.³⁴⁰ These scholars believe that the output side is equally important to international law's legitimacy. They argue that many clubs and networks forge rules and laws that quite effectively and innovatively satisfy the specific and technical needs of a particular group. The demands for legitimacy may be satisfied through effective, workable outputs, be they rules, norms, or law.³⁴¹

The bottom-up lawmaking examples suggest that the output legitimacy argument has merit and warrants consideration. The reality is that the rules born from these bottom-up lawmaking processes have been extremely effective at ordering and greasing a dramatic increase in international trade through export credit. Of course, the argument invites other serious questions that bear mention. First, how should effectiveness be judged and from whose vantage point? The Participants believe that the Arrangement is quite effective because it has met their goal of reducing the cost of export subsidies. But for non-Participant (primarily debtor) countries, whose importers must rely on the higher-priced financing, is the Arrangement an effective means of meeting their goal of facilitating imports for the benefit of their companies and populations? Likewise, the Banking Commission may justifiably offer the UCP 500 as a workable decision-making guide for document checkers in banks' trade finance shops, but it offers little to online providers of instruments akin to letters of credit. These online alternatives allow buyers and sellers to input information into a computer system, which then mechanically and electronically checks the entry information.

Furthermore, if the effectiveness of laws or rules—the outputs of the bottom-up lawmaking process—is to determine legitimacy, these institutions

339. See Keohane & Nye, *supra* note 178, at 282-83.

340. See *id.* at 291 ("At the domestic or international levels, legitimacy should not be viewed solely in terms of majoritarian voting procedures Legitimacy in international regimes depends partly on effectiveness"); see also Robert O. Keohane, *Global Governance and Democratic Accountability* 9 (Apr. 2002) (unpublished manuscript, on file with the author) ("[S]ophisticated proponents of greater global governance understand that cosmopolitan democracy cannot be based on a strict analogy with domestic democratic politics, and they do not rely exclusively on electoral accountability.").

341. See Keohane & Nye, *supra* note 178, at 285-87 ("The legitimacy of governments is not determined solely by the procedures on the input side. Substantive outputs also matter."); Slaughter, *Government Networks: The Heart of the Liberal Democratic Order*, *supra* note 224, at 234 ("On the other hand, legitimacy may be conferred or attained independent of mechanisms of direct accountability—performance may be measured by outcomes as much as process. Courts, and even central banks, can earn the trust and respect of voters without being 'accountable' in any direct sense"); Slaughter, *Governing the Global Economy through Government Networks*, *supra* note 224, at 195.

must be willing to publicize who they are, what they do, and how they regulate their issue areas. How can these institutions showcase their alacrity, ingenuity, and effectiveness behind their currently high and nearly impenetrable walls? While conceptually attractive, the use of output effectiveness to legitimate laws born from these relatively unaccountable processes remains practically difficult absent greater openness. The challenge is to reveal just enough so that stakeholders will come to see these institutions as effective, but not reveal so much that lawmakers are tempted to disband.

V. CONCLUSION

Faced with the challenge of Cold War realism, international legal scholars defensively congregated around the forms of international law rooted in treaty and state practice, generated by governments, and visibly backed by reputational, diplomatic, and economic sanctions. These scholars answered the realist critique by succumbing to the realist fixation on states and their behavior, all the while ignoring the actual nature of multi-layered international lawmaking processes. This Article, by contrast, answers the realist critique not by conceding its premises but by refuting them. Bottom-up lawmaking denies states a monopoly on the generation and enforcement of law. Instead, transnational groups composed of private actors and public technocrats generate, interpret, and enforce bodies of rules that reflect and shape the practices of transnational financial players. While realists rely on anecdotal evidence of how states ignore international law, this Article presents empirical evidence of how states look to these transnational groups as sources of legal and interpretive authority and, as a result, how these groups' directives and opinions come to bind state agencies and domestic courts. Where realism questioned the legal status of international norms, bottom-up lawmaking expands the source and scope of international law, challenging existing theories to fit the facts on the ground.

By looking to international lawmaking's roots in the everyday practices of private and public actors, bottom-up lawmaking does not merely reiterate—with a focus expanded beyond the nation-state—the realists' insistence on tearing away formal legal structures to discover the underlying power dynamics. Rather, bottom-up lawmaking shows that power, practice, and law feed into each other in a more complete cycle than either the realists, or the academic defenders of international law against the realist critique, acknowledge. In response to the realist attack on the very existence of "law" in the international domain, international law scholars contracted their field of study in search of solid ground. It is earnestly hoped that scholars will now respond to the reality of bottom-up lawmaking by expanding inquiry, extending theory, and broadening discussion. The time for retreat is over. The time has come to embrace, to understand, and to celebrate the remarkable diversity of human institutions and practices at the foundation of international law.

